FILED

94 615 OCT - 3 1994

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

JOHN AND JANE DOE, husband and wife,
Adoptive parents of Baby Boy Janikova,

Petitioners,

and

BABY BOY JANIKOVA,
a minor, by his guardian *ad litem*
Edward J. O'Connell,

Petitioners,

v.

OTAKAR KIRCHNER,
biological father of Baby Boy Janikova,

Respondent.

On Petition For Writ Of Certiorari
To The Illinois Supreme Court

PETITION FOR WRIT OF CERTIORARI

John Doe and Jane Doe, Petitioners

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October 1, 1994

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QUESTIONS PRESENTED

1. Whether this Court's ruling in *Stanley v. Illinois* prohibits Illinois from terminating an unwed biological father's parental rights in a newborn child, voluntarily placed for adoption by the mother, if he fails to grasp his opportunity to parent by demonstrating interest, concern or responsibility towards the newborn within 30 days of its birth?

2. Whether this Court's ruling in *Stanley v. Illinois* requires that the 30 day period afforded the biological father under the Illinois statute must be suspended until the father has actual knowledge of the birth of his child?

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Petitioners John Doe and Jane Doe, husband and wife, adoptive parents of Baby Boy Janikova, by and through their attorney, Richard A. Lifshitz, respectfully pray that this Court issue a writ of certiorari to review the opinion that the Illinois Supreme Court entered in this cause on June 16, 1994, and its decision in support of the denial of the Petitions for Rehearing on July 12, 1994.

OPINIONS BELOW

The Order entered by the trial court, terminating the parental rights of Otakar Kirchner, is attached as Appendix C. The opinion of the Illinois Appellate Court, affirming the trial court, is attached as Appendix B, and is reported at 245 Ill.App.3d 405, 627 N.E.2d 648 (1st Dist. 1993). The opinion of the Illinois Supreme Court, reversing the trial and appellate courts, is attached as Appendix A, and is unreported. The decision and opinion in support thereof, of the Illinois Supreme Court denying the Petitions for Rehearing, are attached as Appendix D, and are unreported.

JURISDICTIONAL STATEMENT

On May 8, 1992, the Circuit Court of Cook County, Illinois, found Otakar Kirchner to be an unfit parent and terminated his parental rights concerning Baby Boy Janikova. On May 13, 1992, that court entered a Judgment of Adoption in favor of the Petitioners, John and Jane Doe. On August 18, 1993, the Appellate Court of Illinois, First

District, Third Division, affirmed the decision of the Circuit Court. On June 16, 1994, the Illinois Supreme Court reversed the decisions of the Circuit and Appellate Courts. On July 12, 1994, the Illinois Supreme Court denied the petitions for rehearing filed by the Does and by the child.

In interpreting the Illinois Adoption Act contrary to its express language the Illinois Supreme Court stated that it was bound by this Court's holding in *Stanley v. Illinois*, 405 U.S. 645 (1972). Accordingly, the jurisdiction of this Court is invoked under U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

The Illinois Adoption Act provides:

> Definitions. When used in this Act, unless the context otherwise requires: . . .
>
> D. "Unfit person" means any person whom the court shall find to be unfit to have a child, without regard to the likelihood that the child will be placed for adoption, the grounds of such unfitness being any one or more of the following: . . .

> (l) failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth;

750 ILCS 50/1(D)(l) (1993)

Consents to adoption. (a) Except as hereinafter provided in this Section, consents shall be required in all cases, unless the person whose consent would otherwise be required shall be found by the court, by clear and convincing evidence:

> (1) to be an unfit person as defined in Section 1 of this Act; . . .

750 ILCS 50/8(a)(1) (1993)

The Illinois Parentage Act of 1984 provides:

Presumption of Paternity (a) A man is presumed to be the natural father of a child if:

> (1) he and the child's natural mother are or have been married to each other, even though the marriage is or could be declared invalid, and the child is born or conceived during such marriage;

750 ILCS 45/5(a)(1)

Determination of Father and Child Relationship; Who May Bring Action; Parties. (a) An action to determine the existence of the father and child relationship, whether or not such a relationship is already presumed under Section 5 of this Act, may be brought by the child; the mother; a pregnant woman; any person or public

agency who has custody of, or is providing or has provided financial support to, the child; or a man presumed or alleging himself to be the father of the child or expected child. The complaint shall be verified and shall name the person or persons alleged to be the father of the child.

> (e) If an action under this Section is brought before the birth of the child, all proceedings shall be stayed until after the birth, except for service or process, the taking of depositions to perpetuate testimony, and the ordering of blood tests under appropriate circumstances.

750 ILCS 45/7(a), (e) (1994)

STATEMENT OF THE CASE

A. Introduction

The Illinois Adoption Act (the "Act") requires that if a child is to be adopted, the child's biological parents must either consent to the child's adoption or be found unfit.[1] Under the Act a parent is unfit if he fails "to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth."[2]

The trial court strictly applied this provision of the Act and found Otakar Kirchner ("Otakar"), the biological father of Baby Boy Janikova, to be unfit. The Appellate

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[1] 75 ILCS 50/8(a)(1).

[2] 750 ILCS 50/1(D)(l).

court affirmed the trial court's determination. The Illinois Supreme Court, however, reversed the trial and appellate courts. It held that the thirty day limitation in the Statute could not be strictly applied "because the father had no opportunity to discharge any familial duty." (App. 3). In support of its decision the Illinois Supreme Court stated that it was bound by *Stanley v. Illinois*, 405 U.S. 656 (1972).

B. Factual and Procedural Background

In June of 1990, Daniella Janikova ("Daniella") became pregnant by Otakar Kirchner ("Otakar"). During the first seven months of the pregnancy, Daniella and Otakar lived together. Although Otakar claimed he intended to marry Daniella prior to the baby's birth, he testified that "they couldn't find time to take off work and get married." (T.T. Vol. 1, pp. 28, 78).[3]

Towards the end of January, 1991, Otakar went to Czechoslovakia. Daniella, believing that Otakar was involved with his old girlfriend, moved out of their residence and into a shelter for abused women. In early February, 1991, Otakar returned to Chicago and located Daniella at the shelter. After Otakar located her, and because she was afraid of him, Daniella moved out of the shelter and into her uncle's house. (T.T. Vol. 1, pp. 39-40).

On February 11, 1991, Daniella, while still residing at the shelter for abused women, met with Mr. and Mrs. Doe ("the Does") to discuss the possibility of the Does adopting Daniella's soon to be born child. The Does urged

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[3] Citations to the trial transcript are in the form "T.T. Vol. [ ] p. [ ]."

Daniella to disclose the identity of the child's biological father so that they could contact him to secure his consent to the adoption. Daniella refused to divulge his identity. Over the next few weeks, Daniella was also asked both verbally and in writing, by the Does' attorney, Mr. Thomas Panichi, to disclose the child's birth father. Daniella refused to do so. (T.T. Vol. 1, pp. 48-50).

Towards the end of February, 1991, Otakar met with Daniella on two occasions. The first meeting occurred at a restaurant. The next day Daniella went to Otakar's apartment where they engaged in sexual intercourse. Otakar asked Daniella to come back and live with him. Daniella refused his request. (T.T. Vol. 3, pp. 16-18). On February 28, 1991, Daniella called Otakar at work and told him that she didn't want to see him again (T.T. Vol. 2, p. 58, Vol. 3, p. 18).

On March 16, 1991, Baby Boy Janikova[4] was born. On March 20, 1991, at her meeting with the court's social workers,[5] Daniella was again asked to disclose the identity of the child's birth father. She again refused to do so. (T.T. Vol. 1, pp. 26-27). Under Illinois law there is no procedure to compel a birth mother to disclose the biological father's identity. At the conclusion of her interview with the Court's social workers, Daniella executed a

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[4] The Appellate Court used the pseudonym "Baby Richard" to describe this child.

[5] When a birth mother desires to place her child for adoption she is required to meet with social workers at the Cook County Department of Supportive Services for an interview to determine whether she is making a knowing and voluntary surrender of her parental rights.

final and irrevocable consent to the adoption of her child by the Does.

On March 20, 1991, the Does filed their original petition to adopt, alleging that the biological father of the child was unknown to them. On that same date the trial court terminated Daniella's parental rights and ordered the child to be placed in the home of the Does, where he has since resided.

The Does, more than 30 days after the child's birth, filed an amended Petition which alleged that the child's unknown birth father was unfit because he failed to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child during the first 30 days after its birth. On June 6, 1991, some 88 days after the child's birth, Otakar, filed his appearance in this case. On September 12, 1991 Otakar married Daniella. On September 23, 1991, Otakar, for the first time, filed a Petition seeking to declare that he was the child's father.

Blood tests were taken and based upon their results, the trial court found that Otakar was the biological father of the child. The case proceeded to trial on the issue of whether Otakar had failed to demonstrate a reasonable degree of interest, concern or responsibility within the first thirty days after the child's birth. It is undisputed that Otakar knew that Daniella was pregnant, and that the baby was due to be born on March 16, 1991 (the exact day the child was born). Otakar claimed however, that because he was told by Daniella's uncle, Mr. Joseph

Pocarovsky, that the baby had died, that he was unaware of the existence of his child until May 12, 1991.[6]

The trial transcript contains dramatically contradictory testimony of what Otakar did or didn't do between the end of February, 1991, when he learned that Daniella was not coming back to him, and May 18, 1991, when he first consulted an attorney (T.T. Vol. 1, p. 91). It is, however, undisputed that by the end of February, Otakar knew Daniella was living at her uncle's house and knew the address and location of the house (T.T. Vol. 1, pp. 42, 44, 83-85). Otakar also admitted that he never stopped at Daniella's uncle's house to try to talk to Daniella (T.T. Vol. 1, p. 86); he never sent any letters to Daniella at her uncle's house (T.T. Vol. 1, p. 64); nor did he consult an attorney during this time (T.T. Vol. 1, p. 89). It is also undisputed that after Daniella told Otakar that she did not want to see him again, that Otakar did not inquire as to what hospital Daniella planned to deliver the baby, nor how Daniella was planning to pay the medical bills in connection with the delivery of the baby. (T.T. Vol. 1, p. 64).

At the conclusion of the trial, Otakar argued that (1) because he was initially unaware of his child's existence the thirty day period should not apply until he was unequivocally aware of the child's existence, and (2) that he had not failed to demonstrate interest, concern and

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[6] Otakar himself admitted that he did not believe the baby had died. (T.T. Vol. 1, p. 91). Mr. Pocarovsky testified that Otakar told him that he did not believe the baby had died. (T.T. Vol. 1, pp. 154-155). The trial court made no findings as to when Otakar first learned of the birth of his child.

responsibility towards his child within the first thirty days of birth. The trial court rejected both arguments. It held that the statute must be strictly applied, and that the evidence was clear and convincing that Otakar had failed to demonstrate such interest, concern or responsibility within the first thirty days of the child's birth. Accordingly, on May 9, 1992, the court terminated Otakar's parental rights, and ruled that his consent to the adoption was not required. Subsequently, on May 13, 1992, the court, for the first time, considered evidence on the issue of the child's best interests and entered a Judgment of Adoption in favor of the Does.

Otakar appealed the trial court's determination and its entry of the Judgment of Adoption. Otakar again argued that the thirty day limitation should not apply until he was unequivocally aware of the child's existence. On August 18, 1993, the Appellate Court rejected his arguments and affirmed the trial court's decision. The Appellate Court made a detailed analysis of the evidence and concluded that there was clear and convincing evidence that Otakar had failed to demonstrate a reasonable degree of interest, concern or responsibility towards his child during the first thirty days after its birth. (App. 31). The Appellate Court also held that it would be contrary to the best interest of the child to disturb the judgment of adoption. (App. 30).

Otakar then sought, and was granted, leave to appeal the case to the Illinois Supreme Court. Otakar, once again argued that the thirty day period should not apply to him until he was aware of the child's birth. The Illinois Supreme Court agreed and reversed the trial and Appellate Court decisions. The Illinois Supreme Court refused

to strictly apply the thirty day period by holding that the "father had no opportunity to discharge any familial duty". (App. 3). The Illinois Supreme Court also held that the Appellate Court should never have discussed the child's best interest. (App. 3).

C. How the Federal Question Was Presented

In support of its conclusion that the thirty day period could not begin to run at the child's birth because the father had "no opportunity" to assert his interest, the Illinois Supreme Court cited *Stanley v. Illinois*, 405 U.S. 645 (1972), stating that the "courts of Illinois are bound by that [*Stanley*] decision".[7] (App. 70). Thus, the Illinois Supreme Court, relying on *Stanley*, concluded that unwed biological fathers must have an "opportunity" to assert their parental rights, which must be preserved even if the father misses the statutory deadline for asserting those parental rights.

The United States Supreme Court has jurisdiction to review the Illinois Supreme Court's decision because the Illinois court relied on this Court's decision in *Stanley* to conclude that the thirty day limitation in Illinois' Adoption Act should not be strictly applied. It is clear that a federal question is properly presented when the highest state court passes on a federal claim. *Franks v. Delaware*, 438 U.S. 154, 161-62 (1978); *Raley v. Ohio*, 360 U.S. 426, 436-37 (1959).

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[7] Although the decision denying the petitions for rehearing does not specifically refer to an "opportunity," the previous opinion does.

An examination of the Illinois decision also reveals that the federal question was properly presented because there are no independent and adequate state grounds for its ruling. In determining whether a state court judgment is based on independent and adequate state grounds, this Court reviews the decision to see if the state court expressly stated that its reference to federal law was for guidance only. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). In the absence of a plain statement indicating that the citation to federal cases is for guidance only, this Court then looks to whether the "state court decision fairly appears to rest primarily on federal law or to be interwoven with federal law . . . " *Id.* at 1040. If the "adequacy and independence of any possible state law ground is not clear from the face of the opinion, [this Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1040-41.

A review of the decision clearly demonstrates that the Illinois Supreme Court decided the case the way it did because it believed that the United States Constitution, as construed by this Court in *Stanley*, required it to do so. The court did not indicate anywhere that its reliance upon *Stanley* was for guidance only. The express language of the state statute required that interest be demonstrated "during the first 30 days after its [the newborn child's] birth." No state law ground was referred to by the court as a basis for suspending the thirty day period. Accordingly, the only conclusion is that the Illinois Supreme Court felt that the United States Constitution compelled its decision. Thus, this Court has jurisdiction to review this case.

REASONS FOR GRANTING THE WRIT

The Illinois Adoption Act permits an unwed biological father, of a child voluntarily placed for adoption, to grasp his opportunity to parent his child within the first 30 days of its birth. If he fails to do so, by taking demonstrable actions which show his interest, concern, or responsibility towards the child, then his parental rights can be terminated. The protections afforded unwed fathers under the Adoption Act are consistent with the holdings of this Court. The Illinois statute provides an opportunity for unwed fathers to assert their parental interest in their child, so long as they do so within 30 days of the child's birth. The statute insures that the legal status of children who are placed for adoption will be resolved quickly.

The Illinois Supreme Court, however, based upon its misunderstanding of this Court's ruling in *Stanley* concluded that a strict application of the thirty day period was improper. Instead the Illinois Supreme Court ruled that unwed fathers have "preemptive rights" which include an "opportunity" to assert their parental rights even beyond the thirty day period contained in the statute. (App. 3, 4).

As a result, instead of being able to determine the legal status of children who are placed for adoption promptly, (i.e. shortly after the 30 days expire) there will be indefinite delays for these children and their prospective adoptive parents. Instead of a fixed and definite 30 day period which begins at the child's birth, the Illinois Supreme Court has created an ambiguous 30 day period which begins only when the unwed father learns of the birth of his child.

The uncertainty and unfairness of the Illinois Supreme Court's decision to all of the parties to an adoption proceeding is obvious.

There is no basis for the Illinois Supreme Court's conclusion that *Stanley* "bound" it to grant unwed fathers an unlimited opportunity to assert their parental interest. Additionally, the Illinois Supreme Court's decision is in direct conflict with this Court's decision in *Lehr v. Robertson*, 463 U.S. 248 (1983).[8] This Court, in *Lehr*, recognized that unwed fathers do not acquire constitutional protections concerning their children, solely based upon their biological relationship to the child. Rather, the biological connection only affords the unwed father an opportunity of parenthood, which he alone bears the burden to grasp

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[8] The Illinois opinion also conflicts with this Court's decisions in *Quilloin v. Walcott*, 434 U.S. 246 (1978) and *Caban v. Mohammed*, 441 U.S. 380 (1979). In both cases, this Court acknowledged that biological fathers who have a substantial relationship with their children are protected by the Constitution. In *Quilloin*, where the unwed father had not established a significant relationship with his child, this Court held that the Georgia statute did not violate due process of law by allowing a child to be adopted based solely upon a "best interest" standard. *Quilloin*, 434 U.S. at 255. Similarly, in *Caban* where the unwed father had developed an established relationship with his child, this Court concluded that the relationship was protected by the Constitution. Accordingly, this Court found that the New York statute was unconstitutional because it allowed his child to be adopted without his consent or any finding of unfitness. *Caban*, 441 U.S. at 392-3. Thus, both *Quilloin* and *Caban* recognize that states can constitutionally provide differential treatment for unwed fathers who have not developed significant relationships with their children.

and which a state may properly limit. *Lehr*, 462 U.S. at 259, 262.

The Illinois Supreme Court has improperly shifted the burden from the unwed father to come forward to assert his parental rights, and instead places the burden on the adoptive parents to locate the biological father and advise him of the birth of his child. Neither *Stanley* nor *Lehr* require this result. The Illinois Court, by erroneously deciding that *Stanley* compelled this result, has created a precarious and potentially dangerous situation. An unwed father can claim that he first learned of the birth of his child 60 days or 6 years after the child's actual birth. The Illinois Supreme Court's decision would then allow the unwed father 30 days to assert his parental rights. If he did so, the child's adoption would be overturned regardless of how many days or years the adoptive family had lived together.

The Illinois Supreme Court has failed to require unwed fathers to adhere precisely to the procedural requirements of the statute. Its decision is contrary to the clear language of the statute, this Court's decisions, and the decisions of other state courts. The ruling of the Illinois Supreme Court should not be allowed to remain the law of Illinois. This Court should grant the petition for a writ of certiorari to review the decision of the Supreme Court of Illinois.

I. The Illinois Supreme Court Has Misinterpreted *Stanley v. Illinois*.

The Illinois Supreme Court's reliance on *Stanley* is misplaced. The Illinois court maintains that this Court

ruled in *Stanley* that "unmarried fathers cannot be treated differently than unmarried mothers or married parents when determining their rights to the custody of their children". (App. 70). As this Court's subsequent decisions demonstrate, this Court's holding in *Stanley* is not, however, as broad as described by the Illinois court. *Stanley* does not require that unwed fathers must in all circumstances be treated the same as unwed mothers and married parents.

Mr. Stanley was an unwed father who lived with his biological children and their mother as a family for many years. Under then existing Illinois law, when the children's mother died Mr. Stanley automatically lost custody of his children without any opportunity for a hearing to determine whether or not he was a fit and proper parent. The effect of the Illinois statute was that *all* unwed fathers were presumptively unfit to raise their children. This Court held that the failure to provide Mr. Stanley with a hearing prior to the removal of his children violated his right to procedural due process under the Constitution. *Stanley v. Illinois*, 405 U.S. at 649.

This court's holding in *Stanley* is clear. An unwed biological father who has a substantial relationship with his children is entitled to a hearing to determine the issue of his fitness prior to having his children removed from his custody. Otakar, who had not taken any significant actions to establish a relationship with his child, received a hearing and was found unfit because he failed to assert his parental rights within the first thirty days of the baby's life. Nothing in *Stanley* compels the conclusion

reached by the Illinois Supreme Court that Otakar's parental rights were improperly terminated because he was denied an "opportunity" to assert his parental rights.

In fact, Otakar had many opportunities to assert his parental rights. Under Illinois law, he could have legitimized his relationship with the child by marrying Daniella prior to the child's birth.[9] He also could have filed a parentage petition either before or after the child's birth to demonstrate his interest, concern, or responsibility towards the child.[10] Otakar, solely because he failed to act either prior to, or within 30 days of the birth of his child, did not take advantage of his opportunities under Illinois law to assert his parental rights.

There is nothing in *Stanley* which compels the conclusion that a State cannot place time limits on the unwed father's opportunity to assert his parental rights. It is especially unwarranted for the Illinois Supreme Court to grant unwed fathers an unlimited and open ended time period during which they can assert their parental rights, when opportunities exist under Illinois law to assert those rights even prior to the child's birth.

II. The Illinois Supreme Court Decision Is In Direct Conflict With *Lehr v. Robertson*.

The Illinois Supreme Court, other than relying upon *Stanley*, did not cite any decisions of this Court involving the rights of unwed fathers. In particular, the Illinois

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[9] 750 ILCS 45/5(a)(1).

[10] 750 ILCS 45/7(a).

Supreme Court ignored this Court's decision in *Lehr v. Robertson*, 462 U.S. 248 (1983).

Lehr involved the adoption of a child by his step-father and his wife, who was the child's mother. New York law allowed the adoption to occur without requiring that notice of the adoption proceeding be given to the biological father of the child. However, the statute did provide the biological father an opportunity to assert and protect his parental rights if he registered himself as the child's father in the State's Putative Father Registry. Biological fathers who registered were entitled to notice of any future adoption proceeding involving the child.

In *Lehr*, the biological father failed to register prior to the adoption proceeding, and as a result, did not receive notice of the adoption proceeding even though the adopting parents knew his identity.[11] The biological father challenged the adoption, contending that the New York statute was unconstitutional because it deprived him of an opportunity to object to the adoption while providing this opportunity to mothers.

This Court rejected the biological father's contention, stating that the parental rights of unwed fathers "do not spring full-blown from the biological connection". *Lehr* 463 U.S. at 259. This Court went on to conclude that the "biological connection" provides an unwed father only with an opportunity of parenthood which he alone bears the burden to grasp and that a state may properly limit

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[11] Unlike the adoptive parents in *Lehr*, the Does, did not know the identity of the biological father. They repeatedly made attempts to discover his identity, all of which were unsuccessful.

that opportunity to "promote the best interest of the child". *Id.* at 262, 266. Thus, only if the unwed biological father takes responsibility by coming forward will his "interest and personal contact with his child acquire substantial protection under the due process clause". *Id.* at 262.

The holding of the Illinois Supreme Court directly conflicts with this Court's holding in *Lehr.* The Illinois court held that biological parents have "preemptive rights" to their children (App. 4), whereas this Court held that the "existence of a biological link" alone, between an unwed father and his child does not require constitutional protection. *Lehr,* 463 U.S. at 261. Instead, it is the actions of the biological father, and not merely the "biological link" which establish the relationship which then acquires constitutional protections. This Court stated that the biological father has:

> an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessing of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Id. at 262.

The Illinois statute is entirely consistent with this Court's holding in *Lehr.* It affords an unwed biological father the opportunity to come forward and grasp his parental relationship within the first thirty days of the

child's birth. If the unwed father fails to do so, the state can terminate his parental rights and allow the child to be adopted. The Illinois Adoption Act helps further a legitimate state interest by providing for a prompt determination of the legal status of children who have been placed for adoption. As this Court, in *Lehr*, noted:

> The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also justify a trial judge's determination to require all interested parties to adhere precisely to the procedural requirements of the statute. The Constitution does not require either a trial judge or a litigant to give special notice to non-parties who are presumptively capable of asserting and protecting their own rights.

Id. at 265.

The Illinois statute expressly places the burden upon the biological father to "adhere precisely" to statute by coming forward, within 30 days of the child's birth, and demonstrate interest, concern or responsibility towards his child. Otakar did not "adhere precisely" to requirements of the statute and accordingly his parental rights were properly terminated. Contrary to the Illinois Supreme Court's ruling, but consistent with this Court's decision in *Lehr*, the Constitution does not require that Otakar be given "special notice" since he was "presumptively capable of asserting and protecting [his] own rights".

III. The Illinois Supreme Court's Ruling Shifted The Burden Of Coming Forward To Grasp The Parenting Opportunity From The Biological Father To The Adoptive Parents.

This Court in *Lehr,* clearly decided that the burden of coming forward to grasp the parenting opportunity can constitutionally be placed upon an unwed biological father. The thirty day time limitation contained in the Illinois Adoption Act is consistent with this Court's holding in *Lehr.* Yet, the Illinois Supreme Court, based upon its erroneous interpretation of *Stanley,* concludes that the thirty day period cannot be applied from the time of the child's birth because to do so denies the biological father his "opportunity to discharge [his] familial duty."

The effect of the Illinois Supreme Court's holding is that it relieves unwed fathers of the burden of coming forward to demonstrate interest in their children within the first thirty days, and instead places the burden upon the adoptive parents to notify the unwed father of the birth of his child so that he may have an opportunity to discharge any familial duty. Not only is this contrary to this Court's decision in *Lehr,* but is particularly harsh given the circumstances present here.

Otakar knew that the child had been conceived, that he was the father and when the child was due to be born. The child was, in fact, born on March 16, 1991 the day it was due to be born. Yet, the Illinois Supreme Court ignores the precedent of this Court established in *Lehr* which requires that unwed father must "adhere precisely" to the procedural requirements of the statute in

order to gain constitutional protections. Instead, the Illinois Supreme Court implies that the adoptive parents had an obligation to locate and notify the biological father of the birth of his child, stating:

> In the case at hand, both the adoptive parents and their attorney knew that a real father existed whose name was known to the mother but who refused to disclose it. Under these circumstances, the adoptive parents proceeded at their peril. (App. 71).

The Illinois Supreme Court has shifted the burden of grasping the parenting opportunity away from the biological father, and placed it on the adoptive parents, stating:

> To the extent that it is relevant to assign fault in this case, the fault here lies initially with the mother, who fraudulently tried to deprive the father of his rights, and secondly, with the adoptive parents and their attorney, who proceeded with the adoption when they knew that a real father was out there who had been denied knowledge of his baby's existence. When the father entered his appearance in the adoption proceedings 57 days after the baby's birth[12] and demanded his rights as a father, the petitioners should have relinquished the baby at that time. It was their decision to prolong litigation through a lengthy, and ultimately fruitless, appeal. (App. 3.)

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[12] Contrary to the Illinois Supreme Court decision, Otakar actually filed his appearance on June 6, 1991, some 88 days after the child's birth.

Essentially, the Illinois Supreme Court has refused to apply the clear 30 day time limitation contained in the Illinois Adoption Act because it felt that the adoptive parents had a legal obligation to notify the unwed father of the birth of his child.

An analogous argument was made to this Court by the unwed biological father in *Lehr.* The biological father contended that his constitutional rights were violated because he was never afforded an opportunity to participate in the adoption proceeding. It was acknowledged that the adopting parents knew his whereabouts and failed to notify him of the proceeding. This Court rejected the father's assertions concluding that the failure to give him special notice of the adoption proceeding did not violate the due process clause since he would have received this notice if he had properly registered with the Putative Father Registry. *Lehr,* 436 U.S. at 264. Similarly, if Otakar had availed himself of the opportunities which existed under Illinois law to assert his parental responsibilities, there would be no reason to require the adopting parents to notify him of the birth of his child.

The Illinois Supreme Court, by focusing solely upon *Stanley,* only considered the legal rights of the biological father. The Illinois court not only ignored the child's and the adoptive parents' interests, but it also failed to recognize that the Illinois Adoption Act is a comprehensive statutory scheme which balances the interests of *all* of the parties to an adoption. The Illinois opinion distorted this balance by its unwarranted emphasis upon the "preemptive rights" of biological parents. Neither the Constitution nor this Court's decision in *Stanley* compel the result reached by the Illinois Supreme Court.

IV. The Illinois Opinion Is Inconsistent With Other State Decisions

In addition to ignoring the precedent of this Court, the Illinois Supreme Court ignored the decisions of other states upholding the application of adoption statutes similar to Illinois' statute. For example, In *Shoecraft v. Catholic Social Servs. Bureau, Inc.*, 385 N.S. 448, 451 (Neb. 1986), the Nebraska Supreme Court upheld the strict application of the state statute[13] which required that an unwed father come forward and grasp his opportunity to parent within five days of the child's birth. The Nebraska court ruled that even though the unwed father filed only 4 days after the statutory deadline (and within 9 days of the child's birth), he had forfeited his parental rights concerning the child.

The Illinois Supreme Court also ignored the only Illinois decision which reviewed the application of this provision of the statute. *In re Adoption of J.R.G.*, 247 Ill. App.3d 104, 617 N.E. 2d 377 (1st Dist. 1993). In *J.R.G.* the unwed father filed his paternity action 40 days after the child's birth.[14] The unwed father, like Otakar here, claimed that he made efforts to find out about the birth of his child and that his efforts were frustrated by the birth mother. In rejecting his argument that a strict application of the thirty day period was improper, the Appellate court stated:

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[13] Neb. Rev. Stat. § 43-104.2 (1993).

[14] It is important to note that Otakar did not file his paternity petition until September 23, 1991, more than 6 months after the birth of his child.

> As can be readily observed, the legislature, in enacting section 1(D)(l), has imposed quite an exacting burden upon natural parents in a position such as that of respondent. Nonetheless, that burden in unequivocal, and requires that a parent affirmatively show a commitment to his child within 30 days of birth in order to ensure that proper provisions can be made for the child's permanent placement, if necessary, as soon after birth as is reasonably possible.
>
> Notwithstanding respondent's assertions to the contrary, there were steps he could have taken in this case to demonstrate concern for his child. Despite the fact that he was aware of Mary Ellen's pregnancy in May or June of 1989 and that he was certain he was the child's father, he failed to file a paternity action until February 8 of the following year, approximately six weeks after the child's birth. Section 7 of the Act (Ill. Rev. Stat. 1987, ch. 40, par. 2507) explicitly permits the filing of such action prior to a child's birth as well as afterward by "a man presumed or alleging himself to be the father of the child or expected child." The filing of such action establishes the alleged father's status of record and entitles him to service of process in proceedings involving the child. (See Ill. Rev. Stat. 1987, ch. 40, par. 2507 (e).) Had respondent simply availed himself of the provisions of this section, he would not have had to rely upon the cooperation of Mary Ellen and her family, which he was aware was unreliable, to express his concern for his child.

Id. at 110-111.

Inexplicably, the Illinois Supreme Court does not even discuss *In re Adoption of J.R.G.* While it is true that

the Illinois Supreme Court is not bound by appellate court decisions, it is quite unusual that the Illinois Supreme Court did not even mention *J.R.G.*, since *J.R.G.* is consistent with the precedent of this Court which requires unwed fathers to "adhere precisely" to procedural requirements of the statute.

The Illinois Supreme Court's failure to strictly enforce the thirty day limitation contained in the Illinois statute is apparently based upon its erroneous conclusion that so long as unwed fathers act within 30 days of acquiring knowledge of the birth of their child, then they have appropriately demonstrated interest in their child. The Illinois Supreme Court stated:

> On the 57th day following the child's birth, the father learned of his son's existence and of the pending adoption. On that day, he hired a lawyer and contested the adoption of his son by strangers. One may reasonably ask, What more could he have done? What more should he have done? (App. 69).

This same argument was considered and rejected by the New York Court of Appeals in *Robert O. v. Russell K.*, 604 N.E. 2d 99 (N.Y. 1992). The New York court stated:

> To conclude that [the unwed biological father] acted promptly once he became aware of the child is to fundamentally misconstrue whose timetable is relevant. Promptness is measured in terms of the baby's life not by the onset of the father's awareness. The demand for prompt action by the father at the child's birth is neither arbitrary nor punitive, but instead a logical and necessary outgrowth of the State's legitimate

> interest in the child's need for early permanence and stability.

Id. at 103.

The failure of the Illinois Supreme Court to properly measure promptness, by requiring that unwed fathers act within 30 days of the baby's birth, likewise misconstrues whose timetable is relevant. In doing so, the Illinois Supreme Court has ignored the legitimate state interest of having the legal status of children placed for adoption resolved quickly.

It is obvious that the Illinois Supreme Court has ignored the precedent of this Court, the decisions of other state courts concerning similar statutes, and the only Illinois opinion concerning this provision of the Adoption Act. The Supreme Court's erroneous decision, based solely upon its misunderstanding of *Stanley* will have grave consequences. This decision, if allowed to stand, will have a disastrous impact not only upon the child and the adults involved in this adoption proceeding, but also upon the many adoptive families who have already relied upon the clear language of the statute. The Illinois Supreme Court decision is wrong and should not be allowed to stand as the law of Illinois.

CONCLUSION

Accordingly, petitioners respectfully request that this Court grant the petition for writ of certiorari.

Dated: October 1, 1994

Respectfully submitted,

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APPENDIX A

Docket No. 76063 – Agenda 19 – March 1994.
In re PETITION OF JOHN DOE AND JANE DOE, Husband and Wife, to Adopt Baby Boy Janikova (John Doe *et al.*, Appellees; Otakar Kirchner, Appellant).

(Filed June 16, 1994)

JUSTICE HEIPLE delivered the opinion of the court:

John and Jane Doe filed a petition to adopt a newborn baby boy. The baby's biological mother, Daniella Janikova, executed a consent to have the baby adopted four days after his birth without informing his biological father, Otakar Kirchner, to whom she was not yet married.

The mother told the father that the baby had died, and he did not find out otherwise until 57 days after the birth. The trial court ruled that the father's consent was unnecessary because he did not show sufficient interest in the child during the first 30 days of the child's life. The appellate court affirmed with one justice dissenting. (254 Ill. App. 3d 405.) We granted leave to appeal (134 Ill. 2d R. 315) and now reverse.

Otakar and Daniella began living together in the fall of 1989, and Daniella became pregnant in June of 1990. For the first eight months of her pregnancy, Otakar provided for all of her expenses.

In late January 1991, Otakar went to his native Czechoslovakia to attend to his gravely ill grandmother for two weeks. During this time, Daniella received a phone call from Otakar's aunt saying that Otakar had

resumed a former romantic relationship with another woman.

Because of this unsettling news, Daniella left their shared apartment, refused to talk to Otakar on his return, and gave birth to the child at a different hospital than where they had originally planned. She gave her consent to the adoption of the child by the Does, telling them and their attorney that she knew who the father was but would not furnish his name. Daniella and her uncle warded off Otakar's persistent inquiries about the child by telling him that the child had died shortly after birth.

Otakar found out that the child was alive and had been placed for adoption 57 days after the child was born. He then began the instant proceedings by filing an appearance contesting the Does' adoption of his son. As already noted, the trial court ruled that Otakar was an unfit parent under section 1 of the Adoption Act (the Act) (750 ILCS 50/1 (West 1992)) because he had not shown a reasonable degree of interest in the child within the first 30 days of his life. Therefore, the father's consent was unnecessary under section 8 of the Act (750 ILCS 50/8 (West 1992)).

The finding that the father had not shown a reasonable degree of interest in the child is not supported by the evidence. In fact, he made various attempts to locate the child, all of which were either frustrated or blocked by the actions of the mother. Further, the mother was aided by the attorney for the adoptive parents, who failed to make any effort to ascertain the name or address of the father despite the fact that the mother indicated she knew

who he was. Under the circumstances, the father had no opportunity to discharge any familial duty.

In the opinion below, the appellate court, wholly missing the threshold issue in this case, dwelt on the best interests of the child. Since, however, the father's parental interest was improperly terminated, there was no occasion to reach the factor of the child's best interests. That point should never have been reached and need never have been discussed.

Unfortunately, over three years have elapsed since the birth of the baby who is the subject of these proceedings. To the extent that it is relevant to assign fault in this case, the fault here lies initially with the mother, who fraudulently tried to deprive the father of his rights, and secondly, with the adoptive parents and their attorney, who proceeded with the adoption when they knew that a real father was out there who had been denied knowledge of his baby's existence. When the father entered his appearance in the adoption proceedings 57 days after the baby's birth and demanded his rights as a father, the petitioners should have relinquished the baby at that time. It was their decision to prolong this litigation through a lengthy, and ultimately fruitless, appeal.

The adoption laws of Illinois are neither complex nor difficult of application. Those laws intentionally place the burden of proof on the adoptive parents in establishing both the relinquishment and/or unfitness of the natural parents and, coincidentally, the fitness and the right to adopt of the adoptive parents. In addition, Illinois law requires a good-faith effort to notify the natural parents of the adoption proceedings. These laws are designed to

protect natural parents in their preemptive rights to their own children wholly apart from any consideration of the so-called best interests of the child. If it were otherwise, few parents would be secure in the custody of their own children. If best interests of the child were a sufficient qualification to determine child custody, anyone with superior income, intelligence, education, etc., might challenge and deprive the parents of their right to their own children. The law is otherwise and was not complied with in this case.

Accordingly, we reverse.

Appellate court reversed;
circuit court reversed.

JUSTICE McMORROW, concurring:

I agree with the majority's reversal of the trial court's termination of the respondent's parental rights with respect to his son. However, I believe that the importance of the issues presented in this appeal warrants a more comprehensive analysis than that offered by the majority. Consequently, I write separately to state in greater detail the reasons for my conclusion that the decisions of the trial court and the appellate court were in error.

The facts of this case are set forth in detail in the appellate court proceeding (254 Ill. App. 3d 405) and need not be restated in full at this juncture. The appellate court addressed two issues that are raised in this appeal. As considered by the appellate court, the first issue involves whether the perceived "best interests" of the child to remain with his adoptive parents outweighed

any consideration of the parental fitness of the respondent. The second question addressed by the appellate court is whether the trial court properly found that respondent was an unfit father under the Adoption Act (750 ILCS 50/1(D)(*l*) (West 1992)).

I consider each of these issues *seriatim*.

I

The appellate court held that the respondent's parental rights could lawfully be abrogated, without regard to whether the respondent is unfit, where the court perceives that such termination of parental rights would be "in the best interest of the child." (See 254 Ill. App. 3d at 410-14.) As a result, the appellate court found that the child's "best interests" could override any consideration of the respondent's parental fitness.

To justify its conclusion, the appellate court in the present case found it significant that the Illinois legislature has declared in the Adoption Act that the "best interests and welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act." (750 ILCS 50/20a (West 1992).) I do not believe that this broad policy statement justifies the appellate court's holding.

Notwithstanding this statement of policy, the Adoption Act nevertheless specifically requires that a parent who does not consent to adoption must be found unfit before parental rights may be terminated. (750 ILCS 50/8(a)(1) (West 1992); see also 750 ILCS 50/8(a)(3), (a)(4) (West 1992) (where child is born out of wedlock and is

placed for adoption within six months from birth, consent of child's father is not required, if he was informed that he was the father, and if he failed to undertake acts, as specified in the statute, to show that he has a *bona fide* parental interest in child (*e.g.*, openly living with child, holding himself out as father of child, paying for medical expenses, or visiting with child)).) The Act does not specify, however, that the court may disregard parental fitness when the child is a newborn.

This court has previously held that a broad statement of policy does not authorize the court to act in contravention to or beyond the scope of the specific requirements of a statute. (See *In re M.M.* (1993), 156 Ill. 2d 53, 67 ("liberal construction" and "best interests" under Juvenile Court Act do not confer on trial court the authority to condition guardian's power to consent to adoption).) As a result, the broad statement of policy in the Adoption Act does not support the appellate court's ruling in the instant cause.

In addition, the appellate court's holding is at odds with this court's analysis in *In re Adoption of Syck* (1990), 138 Ill. 2d 255. In *Syck*, this court reviewed a trial court's determination that the biological mother had not expressed reasonable concern, interest or responsibility for her son, and that the mother was therefore an unfit parent under section 1(D)(b) of the Adoption Act. Under section 1(D)(b), a parent is unfit when he or she has failed to "maintain a reasonable degree of interest, concern or responsibility as to the child's welfare." (750 ILCS 50/1(D)(b) (West 1992).) The language in section 1(D)(b) is very similar to section 1(D)(*l*), at issue in the present cause, regarding a failure to demonstrate reasonable

interest in, concern for, or responsibility for a newborn child (see 750 ILCS 50/1(D)(*l*) (West 1992) (parent unfit where parent "fail[ed] to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth")).

In *Syck*, this court held that, where it is alleged that the biological parent is unfit because of a failure to show a reasonable degree of interest in, concern, or responsibility for the child, the court must determine the parent's unfitness *before* the court can proceed to a consideration of the child's "best interests:"

> "When the ruling on parental unfitness, a court is not to consider the child's 'best interests.' [Citations.] At this point, it is the parent's past conduct in the then-existing circumstances that is under scrutiny. [Citations.] The child's welfare and whether the child's eventual adoption by the petitioners would improve his future financial, social, and emotional atmosphere is not relevant in judging the fitness of the natural parent [citations]; nor are these factors relevant in determining, as in this case, whether, in the past, the natural parent maintained a reasonable degree of concern, interest and responsibility as to the child's welfare. Only after a parent is found, by clear and convincing evidence, to be unfit does a circuit court ruling on an adoption petition proceed to consider the child's best interests and whether those interests would be served by the child's adoption by the petitioners, requiring termination of the natural parent's parental rights. [Citations.]" *Syck*, 138 Ill. 2d at 276-77.

The appellate court in the instant cause proposed that *Syck* was "distinguishable and not controlling." (254 Ill. App. 3d at 411 n.2.) The court noted that in *Syck*, "there was no judgment of adoption entered; the child was not a newborn, but rather was eight years old; the issue of unfitness did not relate to the first 30 days after the child's birth, as does the present case; and the issue of unfitness involved section 1(D)(b) of the Adoption Act [citation], rather than section 1(D)(*l*) [citation]." 254 Ill. App. 3d at 411 n.2.

These circumstances are insufficient to deviate from this court's determination in *Syck* that the child's "best interests" cannot justify termination of parental rights where the parent has not been found unfit. The rule expressed by this court in *Syck* has been applied in numerous court decisions (*In re S.J.* (1992), 233 Ill. App. 3d 88, 121; *In re Adoption of D.A.* (1991), 222 Ill. App. 3d 73, 75; *In re A.H.* (1991), 215 Ill. App. 3d 522, 530-31; *In re B.T.* (1990), 204 Ill. App. 3d 277, 281; *Perkins v. Breitbarth* (1981), 99 Ill. App. 3d 135, 139; *In re Adoption of Burton* (1976), 43 Ill. App. 3d 294, 301), including a proceeding where it was alleged that the parent was unfit under section 1(D)(*l*) of the Act. (*In re Adoption of J.R.G.* (1993), 247 Ill. App. 3d 104, 110.) This court's holding in *Syck* reflected the express requirements of our Adoption Act, as explained more fully above, that parental rights generally cannot be terminated unless the parent has been proven unfit. (See 750 ILCS 50/8(a) (West 1992).) In my judgment, *Syck* is both controlling and persuasive authority in the present cause.

The appellate court also relied on certain State and Federal statutory provisions. (705 ILCS 405/2-14 (West

1992) (Juvenile Court Act of 1987); 42 U.S.C. § 675(5)(C) (1988) (Adoption Assistance & Child Welfare Act).) The court "extrapolate[d] and infer[red]" from these provisions that "after a newborn child has been placed for adoption and lives continuously thereafter for longer than 18 months with his adopting parents who adopt or have adopted him pursuant to a judgment of adoption, it would be contrary to the best interest of the child to remove him from his home and family by disturbing the judgment of adoption." 254 Ill. App. 3d at 413.

In cannot agree with the appellate court's "extrapolations" from these statutes. The appellate court *sua sponte* created an irrebuttable, *per se* presumption that, once a newborn child has lived with adoptive parents for at least 18 months, the child's living arrangements cannot be modified. However, the statutory provisions cited by the appellate court pertain to *prompt judicial disposition and review* where foster care has been requested or ordered because of child abuse, neglect, or dependency. (705 ILCS 405/2-14 (West 1992) (Juvenile Court Act); 42 U.S.C. §675(5)(C) (1988) (Adoption Assistance & Child Welfare Act).) The statutes do not require, or suggest, that a newborn child's living environment cannot be modified if the child has lived with adoptive parents for a year and a half. Other cases cited by the appellate court in the case at bar (254 Ill. App. 3d at 411 n.2) do not justify the court's conclusion. See *Giacopelli v. Florence Crittenton Home* (1959), 16 Ill. 2d 556 (custody dispute); *People ex rel. Edwards v. Livingston* (1969), 42 Ill. 2d 201 (custody dispute); *In re Abdullah* (1981), 85 Ill. 2d 300 (recognizing that it would not be in "best interests" of child to delay determination of biological father's fitness until father

exhausted all criminal appeals and collateral review of biological father's murder conviction).

In addition, decisions from other jurisdictions do not support the appellate court's reasoning. For example, in denying the adoptive parents' application for a stay of a State court judgment that ordered return of an infant girl to her biological parents, Justice Stevens of the United States Supreme Court stated:

> "Applicant's claim that [the child's] best interests will be served by allowing them to retain custody of her rests, in part, on the relationship that they have been able to develop with the child after it became clear that they were not entitled to adopt her. Neither [state] law * * * nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education. As the Iowa Supreme Court stated: '[C]ourts are not free to take children from parents simply by deciding another home appears more advantageous.' [Citation.]" (*DeBoer v. DeBoer* (1993), 509 U.S. ___, ___, 125 L.Ed. 2d 755, 757, 114 S. Ct. 1, 1-2.)

Decisions from other States have also held that the parent's fitness must be determined *before* the court can proceed to an inquiry into the best interests of the child, and that parental rights *cannot* be terminated, under the guise of the child's "best interests," if the parent's unfitness has not be [sic] proven. See, *e.g., In re B.G.C.* (Iowa 1992), 496 N.W.2d 239; *Adoption of Kelsey S.* (1992), 1 Cal. 4th 816, 823 P.2d 1216, 4 Cal. Rptr. 2d 615.

It appears that the appellate court in the present cause was persuaded to the result it reached in large part because of the time that has elapsed since the child's birth and the circumstance that the child has lived continuously with his adoptive parents since the baby was a few days old. According to the appellate court, the "only parents that he has ever known are John and Jane Doe. He has not touched or seen [his birth mother] since four days after his birth, and he has never spoken a word to her. Nor has he ever touched, seen or communicated with [his biological father]. In fact, he is totally unaware of the existence of [his biological parents]." (254 Ill. App. 3d at 413-14.) In comparison to the interests of the biological parents, the appellate court found the interests of the adoptive parents much more significant. For example, the appellate court noted that since the child "was a newborn, John and Jane Doe have done everything with [the child] that is the essence of being parents." 254 Ill. App. 3d at 414.

I find the reasoning of the appellate court misguided. The respondent in the present case instituted proceedings to preserve his parental interest in his son less than two months after the child was born, and only a few weeks after he learned that the child was in fact alive. Although the child is now three years old, it is not the fault of the respondent that the boy has been in the custody of adoptive parents for the last three years. Nor is it the fault of the respondent that the child has not ever seen and is apparently unaware of his biological father.

No one would disagree with the view that children, especially those of tender years, should not be bantered about between biological and foster or adoptive parents.

Delay damages the child, regardless of who is eventually awarded custody of the child. The parents, adoptive and biological, also suffer greatly and unnecessarily. These concerns, although valid, do not justify the appellate court's decision in the instant cause to ignore the clear requirements of our Adoption Act that parental unfitness must be proven *before* the court can proceed to a consideration of the child's best interests.

Certain of the *amici* have suggested that the adoptive parents may be able to retain *custody* of the child in the present cause by filing a petition under the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/601 (West 1992) (standing of nonparent to file petition for custody if child is not "in the physical custody of one of his parents"); 750 ILCS 5/602 (West 1992) (custody determinations must be made according to the "best interest of the child")). They offer that the instant cause should be remanded to the circuit court so that the adoptive parents may file such a petition. It is also suggested that, in such a custody proceeding, the best interests of the child would take precedence over the wishes of the biological parents. (See, *e.g., In re Brandon L.E.* (1990), 183 W. Va. 113, 394 S.E.2d 515; Clark, *Children and the Constitution*, 1992 U. Ill. L. Rev. 1; Annot., 15 A.L.R.5th 692 (1993).) However, I do not address the merits of these arguments, since the questions are not properly before this court in the present appeal.

II

The appellate court also concluded that the respondent's parental rights were properly terminated because

the respondent was an unfit parent. Section 1(D)(*l*) of our Adoption Act defines an "unfit person" to include a parent who has "fail[ed] to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth." (750 ILCS 50/1(D)(*l*) (West 1992).) Relying on section 1(D)(*l*) of the Adoption Act, the trial court concluded that respondent was an unfit parent because he had not shown reasonable interest in his son within 30 days after the child's birth. Because termination of parental rights is a permanent and complete deprivation and severance of the relationship between child and parent, legal precedent has demanded a heightened standard of proof, *i.e.*, clear and convincing evidence, in order to prove parental unfitness. (See *Santosky v. Kramer* (1982), 455 U.S. 745, 71 L.Ed. 2d 599, 102 S. Ct. 1388; see also *Stanley v. Illinois* (1972), 405 U.S. 645, 31 L.Ed. 2d 551, 92 S. Ct. 1208; see generally *Lehr v. Robertson* (1983), 463 U.S. 248, 77 L. Ed. 2d 614, 103 S. Ct. 2985; *Caban v. Mohammed* (1979), 441 U.S. 380, 60 L. Ed. 2d 297, 99 S. Ct. 1760; *Quilloin v. Walcott* (1978), 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549.) In my opinion, the proof presented here did not demonstrate, by clear and convincing evidence, that respondent was an unfit parent under section 1(D)(*l*) of the Adoption Act. Consequently, the trial court's determination was against the manifest weight of the evidence.

In *Syck*, 138 Ill. 2d 255, this court suggested several factors to be taken into account in deciding whether a parent has exercised reasonable interest, concern, or responsibility in the child. The factors recited in *Syck* included whether "the actions and statements of others

* * * hinder[ed] or discourage[ed] visitation [citation], and whether the parent's failure to visit the child was motivated by a need to cope with other aspects of his or her life or by true indifference to, and lack of concern for, the child [citation]." (*Syck*, 138 Ill. 2d at 278-79.) The court also observed that, "mindful of the circumstances in each case, a court is to examine the parent's efforts to communicate with and show interest in the child, not the success of those efforts. [Citation.]" (*Syck*, 138 Ill. 2d at 278-79.) Consistent with *Syck*, our appellate court has declined to find a parent unfit where the parent's efforts to establish or maintain parental interest in the children were thwarted, inhibited, hindered, or discouraged by the custodial parent or other interested persons. See, *e.g.*, *Peyla v. Martin* (1976), 40 Ill. App. 3d 373; *In re Jones* (1975), 34 Ill. App. 3d 603; *Culkin v. Culkin* (1975), 30 Ill. App. 3d 1073; *In re Taylor* (1975), 30 Ill. App. 3d 906.

In light of this precedent, the respondent in the present cause was not proven to be an unfit parent. As detailed in the appellate court opinion, the respondent made numerous efforts to aid the child's biological mother before the baby was born, and made numerous attempts to discover whether the child had been born. (See 254 Ill. App. 3d at 419-24 (Tully, P.J., dissenting).) However, the respondent's efforts were blocked and frustrated by the misrepresentations of the biological mother and her relatives. It is undisputed that these persons persistently lied to the respondent and told him the baby had died, although the boy had not.

The appellate court agreed with the trial court's determination that the respondent had not shown adequate, reasonable interest in the child after birth. The

appellate court believed that the respondent did not do all of the things that other persons might have done under similar circumstances to determine whether the child had actually died and to ascertain the child's whereabouts. (See 254 Ill. App. 3d at 415 (suggesting that respondent in present cause could have gone to biological mother's residence "to speak to her directly and confront her about the welfare of his expected child," or that the respondent could have contacted the prenatal physician, or conferred with an attorney or "any public legal agency").) However, the respondent's actions are not to be judged by whether they were successful, but rather by whether they were sincere, genuine efforts to locate and establish contact with the child. The record does not establish that the respondent's efforts were so insufficient or insincere that he should be deprived of his parental interests in his son.

In addition, I believe that the adoptive parents shared a portion of the risk that the respondent, if he discovered the child were still alive, would attempt to assert his parental rights to the child. The record indicates that the adoptive parents were informed of the biological mother's intention to prevent the respondent from asserting any parental interest in the child whatsoever, by misrepresenting to the respondent that the baby had died, even though the biological mother knew the father's identity, as well as his whereabouts. The adoptive parents acquiesced in the biological mother's scheme. The record is devoid of any indication that the adoptive parents made any effort to ascertain the identity of the respondent, or his whereabouts, so that he could be advised of the child's existence.

For these reasons, I concur in the decision of the majority in the instant cause.

JUSTICES MILLER and FREEMAN join in this concurrence.

APPENDIX B

254 Ill.App.3d 405

627 N.E.2d 648

In the Matter of the Petition of John DOE and Jane Doe, Husband and Wife, To Adopt Baby Boy, A Minor.

No. 1-92-1552.

Appellate Court of Illinois,
First District, Third Division.

Aug. 18, 1993.

Petition was filed for adoption of child born out-of-wedlock. The Circuit Court, Cook County, Eugene Wachowski, J., held that biological father was unfit person to have child, such that his consent could be dispensed with. Biological father appealed. The Appellate Court, Rizzi, J., held that: (1) it would be contrary to best interest of child to disturb judgment of adoption once child had lived with adoptive parents for more than 18 months, and (2) father was unfit person to have custody of child based on his failure to demonstrate reasonable degree of interest, concern, or responsibility as to child's welfare during first 30 days after child's birth.

Affirmed.

Tully, P.J., dissented and filed opinion.

Loren L. Heinemann, Orland Park, for appellants.

Richard A. Lifshitz, Carolyn E. Winter, Chicago, for appellee.

Justice RIZZI delivered the opinion of the court:

John and Jane Doe filed a petition to adopt a newborn baby boy, Richard.[1] Richard's biological mother, Daniella Janikova (Daniella), and father, Otakar Kirchner (Otakar), were not married. Daniella executed a consent to have Richard placed for adoption four days after he was born. Daniella, however, did not tell Otakar. Otakar was told that Richard died shortly after his birth. Daniella did not tell Otakar that Richard was living and had been placed for adoption until Richard was 57 days old. After he discovered that Richard had been placed for adoption, Otakar opposed the adoption on the basis that he did not consent. Otakar and Daniella then got married. The adoption case proceeded to trial. The trial court found that Otakar was an unfit person to have a child and therefore his consent for the adoption of Richard was not required. 750 ILCS 50/8, 50/14 (West 1992). The trial court then entered a judgment of adoption, with John and Jane Doe adopting Richard. Otakar has appealed from the judgment of adoption and the orders inherent to the validity of the judgment of adoption. We affirm.

Otakar, age 36, and Daniella, age 25, are émigrés from the former republic of Czechoslovakia. Otakar arrived in the United States in 1986, and Daniella arrived in 1988. In the fall of 1989, they met while working together at a restaurant. They then began living together in an apartment in Chicago. In June of 1990, Daniella became pregnant and she and Otakar were advised that the baby was due to be born on March 16, 1991. Around July of 1990, Daniella stopped working and became a full-time student

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to become a beautician. She was dependent solely upon Otakar for financial support.

Otakar and Daniella continued to live together, and Otakar paid for Daniella's prenatal care. They planned that the baby would be born at St. Joseph's Hospital in Chicago, which is only one block from where they lived.

In January of 1991, Otakar returned to Czechoslovakia for a vacation and to attend to family matters related to his gravely ill grandmother. He remained in Czechoslovakia about 13 days. While Otakar was in Czechoslovakia, however, Daniella received a telephone call from Otakar's aunt. She told Daniella that Otakar had been seeing his former girl friend in Czechoslovakia and that they had married and were on their honeymoon. Daniella became upset. She telephoned Otakar in Czechoslovakia and told him that she did not want to see him anymore. Otakar told Daniella that the story his aunt told her was not true. Nevertheless, Daniella moved out of the apartment and into a shelter for abused women located in Chicago.

While she lived at the shelter, Daniella decided that she would place the baby for adoption. Daniella told her friend, Roberta Scholes, of her plan. Scholes contacted a lawyer for Daniella. Meanwhile, on February 8, 1991, Otakar returned from Czechoslovakia and went to his apartment, where he found that Daniella had moved out and taken all of her belongings.

On February 11, 1991, Daniella met with the lawyer and John and Jane Doe about the proposed adoption. Daniella refused to disclose the name of the baby's biological father to the Does or their lawyer.

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On February 11, 1991, Daniella met with the lawyer and John and Jane Doe about the proposed adoption. Daniella refused to disclose the name of the baby's biological father to the Does or their lawyer.

There were several meetings between Daniella and the Does and their lawyer. At the meetings, Daniella stated that she knew who the biological father of the baby was, but she did not want to disclose his identity because she feared that he would assert his parental rights.

In mid-February 1991, Daniella left the shelter and went to live with her uncle in his house in the Village of Hillside. Otakar knew that Daniella was living at her uncle's house. Otakar telephoned Daniella several times, but she refused to speak to him or return his calls.

Otakar claims that he asked mutual friends to talk to Daniella on his behalf, but Daniella refused their efforts. In addition, during the latter part of February 1991, Otakar gave $500 to a mutual friend, Selva Duran, and asked her to give the money to Daniella. Daniella, however, refused to take the $500.

During the latter part of February, Daniella met with Otakar twice. First, they met at a restaurant. The following day, approximately February 28, 1991, Daniella went to Otakar's apartment where they engaged in sexual intercourse. Otakar asked Daniella to return to live with him in the apartment, but she refused. The next day, Daniella telephoned Otakar and told him that she did not want to see him again. Nevertheless, Otakar made numerous telephone calls trying to reach Daniella at her uncle's house, to no avail.

On March 16, 1991, Daniella went to Alexian Brothers Hospital in Elk Grove Village, Illinois, and Richard was born. Daniella refused to name or identify the biological father of the child. Meanwhile, on March 16, 1991, Otakar had made inquiry about Daniella at St. Joseph's Hospital

because whey they were living together that is where he and Daniella had planned to have the birth of the baby. He was told that Daniella had not been admitted into the hospital. Otakar checked with St. Joseph's Hospital for several days and each time he was told that they had no record of a Daniella Janikova.

On March 20, Daniella executed a document entitled FINAL AND IRREVOCABLE CONSENT TO ADOPTION, for Richard, at the Cook County Department of Supportive Services. See 750 ILCS 50/9, 50/10 (West 1992). On the same day, the Does filed a Petition for Adoption, which averred that the biological father of the child was unknown. Also, a statutory notice by publication was made in the Chicago Daily Law Bulletin, with the averment that the biological father of the child was unknown. 750 ILCS 50/7 (West 1992). March 20, 1991, was also the day that Richard was placed to live with the Does.

Otakar had not been told that Richard had been placed for adoption. On March 20, 1991, Otakar spoke with Daniella's uncle on the telephone. Daniella's uncle told Otakar that the baby had died three days after birth. Daniella's uncle had lied about what had occurred at the direction of Daniella. Daniella's uncle spoke to Otakar subsequently on two other occasions, and each time he told Otakar that the baby had died. It appears, however, that Otakar did not believe that the baby had died. On about March 26, Otakar telephoned Daniella at her uncle's house and left a message on the answering machine: "I don't believe the baby died."

Otakar claims that on many occasions after work at around 3 a.m., he went to Daniella's uncle's house, where

Daniella was living. He looked into Daniella's parked automobile to see if there was an infant's car seat or baby bottles; he also went through the garbage cans at the curb of the house to see if there were any diapers or other similar items. Otakar also claims that he made inquiry at some hospitals seeking information about Daniella and the birth of the baby, to no avail. He also claims that some friends helped him in searching through official public records for a birth or death certificate. They found nothing.

At some time between May 5 to May 10, 1991, Selva Duran told Otakar that the baby did not die but was placed for adoption. This is the first time that Otakar had been told that the baby had been placed for adoption. Otakar did not see or speak to Daniella, however, until May 12, 1991; he had not seen or spoken to Daniella since March 1, 1991. When Otakar went to his apartment after work on May 12, 1991, he found that Daniella had moved back into the apartment, and she told him that the baby had been adopted. Otakar testified: "She said she made a mistake and she can't do nothing anymore because she signed away her whole rights."

On May 18, 1991, more than two months after Richard was born, Otakar spoke to a lawyer for the first time about this matter. On June 6, 1991, Otakar filed an appearance in the adoption proceeding, and on June 13 he sought leave of court to file an Answer. On June 15, 1991, the trial court struck Otakar's Answer on the basis that he had no standing in the adoption proceeding.

On September 12, 1991, Otakar and Daniella married. On September 23, 1991, Otakar filed a Petition To Declare

Paternity. The paternity action proceeded to trial on December 9, 1991, and on that day there was a finding that Otakar was the biological father of Richard.

On December 23, 1991, the Does filed an Amended Petition To Adopt. The amended petition alleged that Otakar was an unfit person to have a child and that therefore his consent for the adoption of Richard was not required. 750 ILCS 50/8, 50/14 (West 1992). The amended petition alleged that Otakar was unfit for the reason that there was a "failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child during the first 30 days after its birth." 750 ILCS 50/1D(*l*) (West 1992).

The adoption trial started on May 5, 1992. On May 6, 1992, the trial court found by clear and convincing evidence that Otakar had failed to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child during the first 30 days after the birth. In making its ruling, the trial court stated:

> That brings me to the conclusion that the law must be strictly complied with, and that the law provides for some interest in the reasonable degree of interest for the child in the first thirty days of the child's existence. Had Mr. Kirchner, instead of probing through garbage bags, gone to [legal counsel] at that juncture there would be no such proceedings here. She would have been in Court, that is Daniella Janikova, and she would have been telling the world where the child was and disclosing what interests Mr. Kirchner had in this child. Instead of that in all

> this time that he wasted trying to contact hospitals, and, again, looking through garbage, he found nothing.
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> Daniella, of course, testified here in open court that she deliberately lied about the birth of the child in suggesting the death of the child, unconscionable behavior.
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> So it is going to be the finding of this court that there is clear and convincing evidence that there was no reasonable degree of interest indicated by Mr. Kirchner in the first thirty days of the life of this child.

On May 8, 1992, the trial court entered an order that Otakar was an unfit person to have a child and that therefore his consent for the adoption of Richard was not required, and that his parental rights were terminated. On May 13, 1992, a judgment for adoption of Richard was entered, with the irrevocable consent to adoption executed by Daniella on March 20, 1991, but without the consent of Otakar. See 750 ILCS 50/14 (West 1992).

Otakar filed a Notice of Appeal on May 8, 1992. On appeal, Otakar claims that the judgment of adoption and the orders inherent to the validity of the judgment of adoption should be reversed, and that Richard be turned over to live with him and Daniella.

Richard has lived continuously with John and Jane Doe since March 20, 1991, four days after his birth. He is now, August 18, 1993, two years and five months old.

Fortunately, the time has long past when children in our society were considered the property of their parents. Slowly, but finally, when it comes to children even the law has rid itself of the *Dred Scott* mentality that a human

being can be considered a piece of property "belonging" to another human being. To hold that a child is the property of his parents is deny the humanity of the child. Thus, in the present case we start with the premise that Richard is not a piece of property with property rights belonging to either his biological or adoptive parents. Richard "belongs" to no one but himself.

Of course, in any parental relationship a parent and a child both have rights, *vis-a-vis*, each other, which are protected under the law. In an adoption, custody or abuse case, however, the child is the real party in interest. Since the child is the real party in interest, it is his best interest and corollary rights that come before anything else, including the interests and rights of biological and adoptive parents.

Here, by inherent necessity, whether or not raised by the embroiled and warring biological and adoptive parents, the best interest of Richard surfaces as the paramount issue in the case.[2] If there is a conflict between

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[2] On the issue of the best interest of the child, the parties have referred to *In re Adoption of Syck* (1990), 138 Ill.2d 255, 149 Ill.Dec. 710, 562 N.E.2d 174, for the proposition that the best interest of the child should not be considered when determining whether a parent is unfit. *Syck*, however, is distinguishable and not controlling here. In *Syck*, there was no judgment of adoption entered; the child was not a newborn, but rather was 8 years old; the issue of unfitness did not relate to the first 30 days after the child's birth, as does the present case; and the issue of unfitness involved 750 ILCS 50/1D(b), rather than 750 ILCS 50/1D(*l*). Also, after *Syck* was decided, the Illinois legislature has made it the public policy of Illinois that the best interest of the child must be considered and be paramount to the interests of his parents in making a permanent home for the child. See 705 ILCS 405/2-14 (West 1991), amended, effective June 24, 1993.

Richard's best interests and the rights and interest of his parents, whomever they may be, the rights and interests of the parents must yield and allow the best interest of Richard to pass through and prevail. This tenet allows for no exception.

A child's best interest is not part of an equation. It is not to be balanced against any other interest. In adoption

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Moreover, our holding as to the best interest of the child is consistent with what the Illinois Supreme Court has stated:

> In *Giacopelli v. The Florence Crittenton Home*, 16 Ill.2d 556, [158 N.E.2d 613], we stated at 565 [158 N.E.2d 613]: 'It is always recognized that a natural parent has a superior right to the custody of his child. That right, however, is not absolute and must yield to the best interest of the child. Such superior right only obtains when it is in accord with the best interest of the child.'
>
> 'The best interest of the child is the standard and it is not necessary that the natural parent be found unfit or be found to have legally forfeited his rights to custody, if it is in the best interest of the child that he be placed in the custody of someone other than the natural parent. * * * The parents' natural rights must give way to the welfare and best interest of the child.' *People ex rel. Edwards v. Livingston* (1969), 42 Ill.2d 201, 209, 247 N.E.2d 417, 421.

In determining whether the biological father was unfit pursuant to the Adoption Act, the Illinois Supreme Court stated in, *In re Abdullah:*

> Moreover, the paramount consideration in this case is what will happen to Hannibal. (Ill.Rev.Stat.1977, ch. 40, par. 1525.) His best interest must be considered, and further delay in the disposition of this case is not in his best interest. Hannibal is already 6 years old. His future should be settled as quickly as possible. *In re Abdullah*, (1981) 85 Ill.2d 300, 310 [53 Ill.Dec. 246, 251], 423 N.E.2d 915, 920.

cases, like custody and abuse cases, a child's best interest is and must remain inviolate and impregnable from all other factors, including the interests of the parents. *In re Ashley K.* (1991), 212 Ill.App.3d 849, 879, 156 Ill.Dec. 925, 943, 571 N.E.2d 905, 923; 705 ILCS 405/2-14(a); 750 ILCS 50/20a (West 1992). In recognition of this fact, the Adoption Act provides:

> **Best interest and welfare of child – Construction of Act**
>
> The best interests and welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act. 750 ILCS 50/20a (West 1992).

Attempting to resolve what is the best interest of an infant is obviously a wrenching ordeal. In cases like the present, however, if one focuses on the child while disregarding the tendentious arguments of the biological and adoptive parents, he is left with the unquestionable conclusion that resolution of the issue of parentage quickly is foremost in the best interest of the child. Also, serious delay in resolving the child's parentage not only frustrates the best interest of the child, but it can cause grave harm to the child.

The best interest of children was recently considered by the Illinois legislature when it amended the Juvenile Court Act to place the best interest of children paramount to the rights and interests of parents. The Juvenile Court Act, as amended, reads as follows:

> Date for Adjudicatory Hearing.
>
> (a) Purpose and policy. The legislature recognizes that serious delay in the adjudication of

> abuse, neglect, or dependency cases can cause grave harm to the minor and the family and that it frustrates the best interests of the minor and the effort to establish permanent homes for children in need. The purpose of this Section is to insure that, consistent with the federal Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272, as amended, and the intent of this Act, the State of Illinois will act in a just and speedy manner to determine the best interests of the minor, including providing for the safety of the minor, identifying families in need, reunifying families where it is in the best interests of the minor, and, if reunification is not in the best interests of the minor, finding another permanent home for the minor. 705 ILCS 405/2-14 (West 1992).

The federal Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272, as amended, to which the Juvenile Court Act makes reference, reads as follows:

> The term 'case review system' means a procedure for assuring that —
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> * * * * * *
>
> (C) with respect to each child, procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a dispositional hearing to be held * * * no later than eighteen months after the original placement * * * , which hearing shall determine the future status of the child (including, but not limited to, whether the child should be returned to the parent * * * [or] should be placed for adoption * * *) * * * . 42 U.S.C. § 675(5)(C) (1988).

We extrapolate and infer from the Juvenile Court Act, as amended, and the federal Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272, as amended, that after a newborn child has been placed for adoption and lives continuously thereafter for longer than 18 months with his adopting parents who adopt or have adopted him pursuant to a judgment of adoption, it would be contrary to the best interest of the child to remove him from his home and family by disturbing the judgment of adoption.[3]

The present case vividly illustrates why it would be contrary to the beset interest of the child to remove him from the parents who adopted him if he has lived with them continuously for the first 18 months of his life. Richard is now two years and five months old. The only parents that he has ever known are John and Jane Doe. He has not touched or seen Daniella since four days after his birth, and he has never spoken a word to her. Nor has he ever touched, seen or communicated with Otakar. In fact, he is totally unaware of the existence of Daniella and Otakar.[4]

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[3] The Adoption Act itself recognizes time limitations in adoption proceedings, even in actions based on fraud and duress. The Adoption Act provides: "No action to void or revoke a consent to or surrender for adoption, including an action based on fraud or duress, may be commenced after 12 months from the date the consent or surrender was executed." 750 ILCS 50/11 (West 1992).

[4] Although the interest of Daniella is not legally an issue, one can hardly blink at the reality of her interest in the case. After refusing to identify Otakar as the biological father of Richard and signing a final and irrevocable consent to adoption, she lied about Richard's birth. She attempted to obtain a fake

The fact that we have the Adoption Act in Illinois is a recognition in the law that it takes more to being a parent than being one of the sexual partners to the physiological formation of a child. Since Richard was a newborn, John and Jane Doe have done everything with Richard that is the essence of being parents, and Richard has done everything with them that is the essence of being a son. Contrariwise, since he was a newborn, Daniella and Otakar have done nothing with Richard that is the essence of being parents, and he has done nothing with them that is the essence of being a son.

There comes a point when we should not be ignorant as judges of what we know as men and women. See *Watts v. Indiana* (1949), 338 U.S. 49, 52, 69 S.Ct. 1347, 1349, 93 L.Ed. 1801, 1805; *People v. Gilliard* (1983), 112 Ill.App.3d 799, 807, 68 Ill.Dec. 440, 447, 445 N.E.2d 1293, 1300. Plainly, it would be contrary to the best interest of Richard to "switch" parents at this stage of his life. We must therefore act accordingly. Courts are here to protect children — not to victimize them.

Under the circumstances, we conclude that it would be contrary to the best interest of Richard to disturb the judgment of adoption. We, therefore, affirm the judgment of adoption and the orders inherent to the validity of the judgment of adoption for the reason that it would be in

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death certificate for him. She later had her uncle tell Otakar that Richard died. Subsequently, however, she married Otakar. Now, both Otakar and Daniella wish to have the judgment of adoption vitiated. In such instances, courts should not favor any interest that the biological mother may have in the case, and should view her testimony as would Diogenes.

the best interest of Richard and he is the real party in interest.

We also affirm the judgment of adoption and the orders inherent to the validity of the judgment of adoption for another reason. There is clear and convincing evidence that Otakar was an unfit person to have a child because he failed to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child during the first 30 days after the birth. 750 ILCS 50/1D(*l*), 50/8(a)(1) (West 1992). His consent to the adoption was therefore not required. 750 ILCS 50/14 (West 1992).

One may rightfully infer that a man who has a reasonable degree of interest, concern or responsibility as to the welfare of his newborn child would have assiduously tracked what was happening during the pregnancy and the birth of the child. It follows that when a court is considering whether a biological father has demonstrated a reasonable degree of interest, concern or responsibility as to the welfare of his newborn child during the first 30 days after the birth, the court may consider what occurred during the entire pregnancy and birth as going to the weight and credence of the testimony and evidence in the case.

Here, we must bear in mind that Otakar had returned from Czechoslovakia and was living in Chicago more than a month before Richard was born. Although he and Daniella were not married, he knew the due date for the birth of Richard. Yet, he did virtually nothing that a responsible unwed man would do if he expected that a woman would soon give birth to his child. It is no solace

for Otakar to claim that the mother did not answer his telephone calls and he let it be. More needed to be done to demonstrate a reasonable degree of interest, concern and responsibility for the welfare of one's expected child.

Specifically and most telling, Otakar knew where the mother lived but *never* went to her residence to speak to her directly and confront her about the welfare of his expected child. Moreover, he did not write to the mother about his concern for the welfare of his expected child; he did not contact the physician whom the mother had been seeing for prenatal care to obtain information and express his concern for the welfare of his expected child; he did not show any effort to participate in giving his expected child a first name or surname; and he did not consult a lawyer or any public legal agency to determine his rights and responsibilities as an unwed father with respect to the birth, care or custody of his expected child.

In addition, an unwed man who sincerely believes that he was one of the sexual partners to the physiological formation of a child may file a lawsuit to determine legally whether he is the father and assert his parental rights *before* the child is born. 750 ILCS 45/7 (West 1992). Otakar did not file such a lawsuit. Had he done so, he could have asserted his parental rights for Richard from the moment Richard was born. It is no excuse for Otakar to claim that he did not know the law, since he did not bother to seek legal advice.

Thus, the record clearly shows that although Daniella did not return Otakar's telephone calls shortly before Richard was born, Otakar was content "to just let his

child be born" without any interest, concern or responsibility as to the care, custody or welfare of the child. This fact goes to the weight and credence of the testimony and evidence as to what occurred within the first 30 days after the birth of Richard.

Otakar's conduct within the first 30 days after Richard was born is consistent with his lack of interest and concern shortly before Richard was born. Otakar claims that on March 16, 1991, the day Richard was born, he went to St. Joseph's Hospital and was told that Daniella had not checked into the hospital that day. He checked with St. Joseph's Hospital for several days and each time he was told that the hospital had no record of a Daniella Janikova.

On March 20, 1991, Otakar spoke with Daniella's uncle on the telephone and Otakar was told that the baby had died three days after birth. Otakar spoke to Daniella's uncle subsequently on two other occasions and on each occasion the uncle told Otakar that the baby had died. On or about March 26, 1991, however, Otakar telephoned Daniella's uncle and left a message on the answering machine stating that he did not believe that the baby died.

Otakar claims that on several occasions he went to Daniella's uncle's house, where Daniella was living, and looked into Daniella's car to see if there were any objects that would ordinarily be used by an infant. He also went through the garbage cans at the curb of the house looking for diapers or other objects that might be used by a baby. In addition, Otakar claims that he made inquiries at a few hospitals to see if Daniella had been admitted. He also

claims that he had some mutual friends attempt to speak to Daniella on his behalf, and that some friends aided him in searching through official public records for birth or death certificates.

There is no evidence that Otakar did anything else until May 12, 1991, or the first 57 days after Richard was born, to determine whether Richard was living or dead. Specifically, Otakar did not go to the mother's residence to speak to her directly and confront her about the birth, care, custody or possible death and funeral arrangements and burial of his child. Moreover, he did not write to the mother about the birth, care, custody or possible death and funeral arrangements and burial of his child; he did not contact the physician whom the mother had been seeing for prenatal care concerning the birth or possible death of his child; and he did not consult a lawyer or any public legal agency to determine his rights and responsibilities as an unwed father with respect to the birth, care, custody or possible death and funeral arrangements and burial of his child.

In addition, Otakar's self-serving statements about looking in the mother's car and in garbage cans lack credibility and are not convincing. The statements were not corroborated and they are inexplicable. According to Otakar, although he knew where she was living and was in front of her residence on several occasions, he never rang the mother's doorbell or knocked on her door to speak to her directly and confront her about the birth or death of the baby. Why would a father who was truly concerned about the life, welfare or death of his baby not have rung the doorbell or knocked on the door?

Judging from what Otakar did and did not do, Otakar was apparently content to go on with his life never truly knowing whether he had a child who was living or had a child who had died. Surely, the scant and churlish effort made by Otakar to discover whether his child was alive or dead does not demonstrate "a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child during the first 30 days of its birth." 750 ILCS 50/1D(*l*) (West 1992).

Our conclusion is in accord with the conclusion of the guardian *ad litem* for Richard. The guardian *ad litem* participated in all of the lower court proceedings, including the trial. At the conclusion of the evidence, the guardian *ad litem* advised the trial court as follows:

> The legislature has acknowledged that all decisions under the Adoption Statute must keep an eye to what is in the child's best interest, but in weighing best interest, as counsel for the petitioner has argued, the Court cannot look at which home might be a better home. That is not an issue. The Court must evaluate the statutes, however, with recognition of the fact that we are dealing with a baby here. We are not dealing with a trophy which is to be passed from person to person. We are dealing with a child who on account of the actions of the mother of the child was placed into a home straight from the hospital where that baby was born. That is a fact which was established by the evidence which was presented in this case.
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> * * * * * *
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> I believe that the evidence which has been adduced before this Court has established by a

> clear and convincing standard that Mr. Kirchner is an unfit person under this section of the Adoption Act.
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> * * * * * *
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> I believe consequently that the Court can determine that Mr. Kirchner is not required to consent to this adoption pursuant to the provisions of Chapter 40, Section 1510.

After a thorough review of the record, we agree with the statements and conclusion of the guardian *ad litem*.

We therefore affirm the judgment of adoption and the orders inherent to the validity of the judgment of adoption for the reasons that Otakar was an unfit person to have a child and his consent to the adoption was not required. See 750 ILCS 50/8(a)(1), 50/14 (West 1992).

Finally, we are constrained to address another matter in this case. Richard's story is the account of a helpless child caught in the quagmire of a judicial system that in attempting to resolve his problem became part of his problem. It has taken two years and five months for this case to sluggishly move through our judicial system. In a case of this nature, where plainly time is critical, it is a sad commentary on our judiciary.

It shamefully took one year and almost two months from the time that the petition for adoption was filed to the time that the judgment of adoption was entered. It has shamefully taken one year and three months from the

time that the notice of appeal was filed to decide this case in the appellate court.[5]

It is surely imperative that the judiciary have enough judges and proper judicial case management in place at both the trial and appellate levels so that "time" does not become a factor in the decisional process of a case. Every effort must be made to see that we do not have any more cases in Illinois where it takes two years and five months to determine the lawful parentage of a young child. Moreover, the judiciary must come to grips with the fact that the psyche of our society can ill afford cases where children are "switched" parents after the first 18 months of their life.

Accordingly, the judgment of adoption and the orders inherent to the validity of the judgment of adoption are affirmed for the reasons stated.

AFFIRMED.

CERDA, J., concurs.

TULLY, P.J., dissents.

Presiding Justice TULLY, dissenting:

The majority, in its misguided fervor to champion "injustice", has patently distorted and slanted the actual facts of this case on a number of important points. In

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[5] The attorneys are not blameless for the delay. No attorney in this case has ever filed a motion to advise the court of the exigent nature of the case or to have the case expedited. As a result, this case just "hung around" on the court's case calendar in the trial court and in the appellate court as if it were not a case involving an exigency.

fairness to the biological parents, as well as to Baby Richard, who will probably someday be confronted with the reality of his plight, the following clarifications are necessary to a just analysis of this case.

The majority somewhat misleadingly states: "Otakar did not see or speak to Daniella until May 12, 1991; he had not seen or spoken to Daniella Since March 1, 1991." (254 Ill.App.3d at 409, 194 Ill.Dec. at 314, 627 N.E.2d at 651.) As will be explained below, he attempted to contact her on numerous occasions during the month of March and in fact did speak to her in the hospital on at least one occasion. Later the majority asserts: " * * * he did virtually nothing that a responsible unwed man would do if he expected that a woman would soon give birth to his child." (254 Ill.App.3d at 415, 194 Ill.Dec. at 317, 627 N.E.2d at 654.) In fact, Otakar attempted to send $500 to Daniella through their mutual friend, Selva, but Daniella refused the money. This would indicate a desire to provide for future financial arrangements, even after the baby's birth. Daniella had told Selva as well as other mutual friends that the baby had died at birth and they later repeated this to Otakar. Otakar also paid all prenatal medical and living expenses and he arranged for delivery of the baby at St. Joseph's Hospital, which was conveniently located very near to the couple's apartment.

The majority repeatedly mentions Otakar's failure to make funeral and burial arrangements for the baby. (254 Ill.App.3d at 416, 194 Ill.Dec. at 318, 627 N.E.2d at 655.) As his testimony will show, Otakar did not really believe the baby had died, but on the other hand, he had no proof of the baby's existence and had not the vaguest idea that the baby had been given away without his

consent. Finally, in a most egregious departure from all evidence presented in the record, the majority declares: "Otakar was content 'to just let his child be born' without any interest, concern or responsibility * * * " (254 Ill.App.3d at 415, 194 Ill.Dec. at 318, 627 N.E.2d at 655) and "Otakar was apparently content to go on with his life never truly knowing whether he had a child who was living or had a child who had died." (254 Ill.App.3d at 417, 194 Ill.Dec. at 318, 627 N.E.2d at 655.) The following presentation of *all* the facts will clearly demonstrate that the majority in this case has employed judicial sophistry in creating an untruthful scenario of the "big, bad and unfit" biological father in this case.

I. *STATEMENT OF FACTS*

The birth mother, Daniella, was single and 24 years old at time of becoming pregnant. She immigrated to the U.S. from Czechoslovakia in August 1988 to live with her uncle. In November 1989, she began living with petitioner, Otakar, at his Lake Shore Drive apartment. She first found out she was pregnant in June 1990. Her due date, March 16, 1991, was also the eventual date of Baby Richard's birth. Otakar was informed of the baby's due date and delivery arrangements were scheduled for St. Joseph's Hospital in Chicago.

Otakar, also an immigrant from Czechoslovakia, returned to his homeland in January 1991 for two weeks in order to visit his ill grandmother. During this time, Daniella received a phone call from Otakar's aunt in Czechoslovakia informing Daniella that Otakar had resumed dating his former girlfriend, that they were still

in love and acting as if they had never broken up. She reacted to this phone call by ripping up the marriage certificate, required for a marriage under Illinois law, and previously obtained by Daniella and Otakar. However, the marriage was delayed due to their conflicting work schedules. Daniella then gathered her belongings and moved from Otakar's apartment to a shelter for women in an apparent state of desperation and confusion.

At the time, she was eight months pregnant and not working. She spoke with a social worker, Ms. Scholes, who said she had two options: (1) put the baby up for adoption or (2) wait for the father to return and see what he says. She refused to disclose the name of the father to the social worker and told her that "she would lie" to the father in order to allow the adoption of the baby. This triggered the process which culminated in the destruction of the family planned by Daniella and Otakar. (Would not counseling have better helped Daniella to deal with this emotional period, rather than pressure from a social worker to consent to adoption?)

Daniella then met with the adoptive parents, the Does, and told them she wanted a two-parent family for her baby, because if she went back to Otakar it would be without a baby. She was then contacted by the Doe's attorney, Tom Panichi. Daniella told him she knew the name of the birth father but refused to give it because she did not want him to have any rights to the baby. She also informed Panichi that she planned to tell the father that the baby had died at birth. This encounter with Daniella should have been a warning signal to both Panichi and the Does of Daniella's dubious emotional state.

At this time, Daniella knew Otakar was back in the United States because she had called him at work. She called him on Valentine's Day 1991 and said: "I just want to remind you to call somebody who you love." She then hung up the phone without giving Otakar a chance to respond. She told the Does that Otakar had her number at the shelter and that she did not feel safe. This behavior would perhaps be indicative of a scorned, pregnant woman, who began to question her feelings for Otakar.

Thereafter, Daniella moved to her uncle's house in Hillside, Illinois. She called Otakar one day at work and met him later at a restaurant. Otakar knew she was living at her uncle's house. They met the next day at Otakar's apartment, where they attempted to reconcile and they engaged in sexual relations. Afterwards, Daniella became confused and told Otakar she did not know what she wanted, as far as a future with him or the baby. This further corroborated Daniella's then confused mental state.

After the birth of Baby Richard on March 16, 1991, she avoided Otakar and she refused to accept his phone calls. The baby was delivered at a hospital near the uncle's suburban home instead of St. Joseph's Hospital as planned. Otakar did not know where the baby was delivered and went to St. Joseph's Hospital in search of Daniella and the baby. Daniella told her uncle to tell Otakar that the baby had died and he obliged. She remained living at her uncle's house until May 12, 1991, when she resumed living with Otakar. At this time she confessed all of her prior falsehoods about the death of the baby and how she had consented to the baby's adoption.

On March 19, 1991, three days after Baby Richard's birth, the adopting parents, the Does, filed a petition to adopt Baby Richard, falsely alleging that the father of the baby was "unknown" and that the address of said father was unknown. In their amended petition to adopt, count I alleged that the parental rights of the natural mother, Daniella, were terminated on March 20, 1991 after she voluntarily consented to allow her son, born on March 16, 1991, to be adopted. Count I further alleged that the natural father, Otakar Kirchner, was an *"unfit parent"* under Section 1 of the Adoption Act (750 ILCS 50/1D(*l*), 50/14 (West 1992)) in that he: (a) failed to show a reasonable degree of interest in the child within the first 30 days of life; (b) abandoned the child; (c) engaged in open and notorious fornication. The fornication allegation was later dropped from the petition.

In the alternative, count I stated that Otakar's consent to the adoption was not necessary under Section 8 of the Adoption Act (750 ILCS 50/8 (West 1992)) in that:

> (a) he was informed he was the father of the child;
>
> (b) the child was placed for adoption under 6 months;
>
> (c) and he failed to do at least one of the following:
>
> > (1) openly live with the child for at least one half length of the child's life prior to adoption;
> >
> > (2) openly hold himself out to be the father during such period of time; or

(3) pay a fair and reasonable sum for medical expenses.

At the adoption hearing, counsel for the Does made the following arguments: Otakar did not: (1) live with child; (2) hold himself out as the father and (3) did not pay reasonable medical expenses. They also alleged that Otakar did not: (1) show a reasonable degree of interest in Baby Richard within 30 days of birth; and (2) abandoned Baby Richard. Counsel also argued that the fact he married the birth mother six months later did not in any way affect whether he was fit or showed a reasonable degree of interest within the first 30 days of the baby's life.

Otakar asserted an affirmative defense under the Adoption Act, which provides that impediments beyond a father's control are a defense to his showing a reasonable degree of interest in the child within 30 days after birth. Specifically, Otakar asserted as a defense the deception of the birth mother in representing to Otakar that Baby Richard had died at birth and in hindering all contact with her after the birth of Baby Richard. Upon finding out about the adoption on May 12, 1991, Otakar contacted an attorney and promptly moved on June 6, 1991, filing an appearance challenging the adoption of his infant son by the Does. Thus, Otakar exhibited a "reasonable degree of interest" in his child within 30 days of finding out about the existence of the child as well as his adoption, and after the impediment had been removed.

Otakar testified that during eight months of Daniella's pregnancy, prior to her leaving his apartment, he paid for all household expenses and maternity clothes

and other expenses relating to the pregnancy. Moreover, he fully supported Daniella so that she did not have to work during the pregnancy. During his first week in Czechoslovakia, he and Daniella talked to each other every day, then Daniella stopped answering the telephone. During their final overseas phone conversation, Daniella accused Otakar of honeymooning with his ex-girlfriend. When he returned to his apartment in Chicago, the keys and a torn-up marriage license were thrown on a table. She had never told him she was considering adoption. He had recently allowed her to purchase a car on his credit card. They got back together for a day at Otakar's apartment and Daniella "was talking like nothing had happened." Otakar listened to the baby moving inside and they discussed the baby's birth. The next day she called him at work and said she did not know her feelings toward him. Then she said she did not want to see or talk to Otakar anymore. This was sometime around February 28th, just two weeks before Baby Richard's birth.

On the due date, March 16th, Otakar called St. Joseph's Hospital and went there personally looking for Daniella but she was not there. On March 20, four days after the baby's due date, Otakar spoke with the uncle who said the baby had died. He had absolutely no knowledge of the adoption or Daniella's plans to consent to adoption. At the end of March, he left a message on the answering machine at her uncle's house that he did not believe that the baby had died. He then started driving to the uncle's house everyday looking for evidence of a baby. On at least one occasion he was stopped by police and questioned about his loitering around the uncle's house.

A customer from the restaurant, managed by Otakar, contacted Senator Paul Simon's office to find out if a death certificate had been issued on the baby, but the search was only valid for the City of Chicago, not the suburbs, where the baby was delivered. Otakar also testified that other friends confirmed Daniella's story that the baby had died.

Otakar tried calling Daniella four or five times a day but she would not pick up the phone. He also tried sending her $500 in cash through their mutual friend, Selva. He did not speak to her again until after the baby was born around March 25th, when he talked to her briefly in the hospital. (Apparently, Daniella had called him from the hospital, but Otakar did not know which one.)

The attorney who handled the adoption for the Does, Tom Panichi, testified that he knew that Daniella was reluctant to furnish the name of the birth father. He also knew she had continued contacts with the father and that she was planning to tell the birth father that the baby had died. She even asked Panichi if he could help in her scheme to falsify a death certificate for the baby. Daniella later told the Does that she thought a child should be raised by a two-parent family.

It should be noted that under Illinois law, in order to serve notice of an adoption to the father by publication, the attorney must inquire as to the address of the father. Panichi signed a notarized "Affidavit For Service By Publication" wherein he stated under oath that the father "on due inquiry cannot be found so that process cannot be served upon defendant." Panichi later testified that he

failed to make any effort to ascertain the address of Otakar, who was then still living in the same apartment on Lake Shore Drive. He never asked Daniella about her address prior to living with her uncle. Daniella also told Panichi that the birth father would never consent to an adoption, whereupon Panichi told her the only other "remedy" would be to find unfitness. Panichi testified: "[Daniella] led us to believe that she was going to be able to control [Otakar] for not coming forward by still secreting the birth and the whereabouts [of the baby.]"

When the Does filed their petition for adoption they alleged that "the biological father is unknown" and that "the address of said father is unknown." Subsequently, the Does filed their "Amendment To Supplement Petition For Adoption" wherein they again asserted that the father was unknown and his whereabouts were then unknown. The first petition was personally signed by the Does and the amended petition was signed by the Does's attorney, Panichi, on their behalf. At this time, both the Does and their attorney knew this to be untruthful. They had both been told by Daniella that she knew the name of the father and his whereabouts. Hence, the adoption petition filed was fraudulent and illegal and the subsequent adoption decree entered thereon was void. During the initial adoption hearing, prior to Otakar's involvement in the case, Daniella informed the court that she did not know the identity of Baby Richard's father. This was stated in the presence of the Does and their attorney, all of whom knew this to be false.

Daniella's Uncle Joe testified and corroborated the stories of both Daniella and Otakar. Daniella originally lived with him prior to moving out to live with Otakar.

Sometime in February 1991, Daniella returned to live with him, during which time she delivered a baby. He knew that the baby was born alive and had not died. He never saw the father, Otakar, inside or outside of his house. After the baby was born, at the request of Daniella, Uncle Joe told Otakar that the baby had died. Otakar left several messages on the answering machine at the uncle's house, but Daniella refused to take Otakar's calls.

The couple's mutual friend, Selva, testified that she worked in the pastry shop at the restaurant complex managed by Otakar and she knew about the baby as well as about the birth arrangements at St. Joseph's Hospital. She did not know that Daniella wanted to put the baby up for adoption. Prior to the birth of the baby, Otakar gave Selva $500 to give to Daniella, but Daniella refused to take it. She did not talk to Daniella again until May 9, 1991, when Daniella came over to Selva's house to tell her the truth about the baby and that she had consented to adoption. Selva then went to Otakar's place of business and told him about the adoption. On May 12, 1991, Daniella moved back to Otakar's apartment and explained to him what had happened with the baby.

II. *FINDINGS OF THE TRIAL COURT*

At the close of the adopting parents' case, counsel for Otakar moved for a directed verdict based upon the failure of the Does to present clear and convincing evidence of unfitness by the birth father. He argued that if the failure of a person to show a reasonable degree of interest in the child under the Adoption Act is caused by

impediments beyond the person's control, this constitutes an affirmative defense to the charge of "unfitness." The motion was denied.

At the conclusion of all the evidence, the trial judge declared Otakar an "unfit parent" partially based upon the fact that Otakar had travelled to his homeland for a brief period in January 1991. However, he returned to the U.S. one and one-half months prior to the birth of Baby Richard. The trial judge also found Otakar "unfit" because he should have been seeking legal advice when instead he was trying to make contact with the birth mother. On May 8, 1992, Otakar's parental rights were terminated based upon his unfitness and the adoption decree favoring the Does was entered on May 12, 1992.

The trial judge apparently did not take into consideration the fact that Otakar was hindered from showing an interest in the baby within the first 30 days of birth *as a result of* the scheme propagated by Daniella. Moreover, it should be noted that both the adopting parents, their lawyer and the social worker who arranged this adoption were all aware of Daniella's "plan" to defraud Otakar of his rights to the baby and that she was well aware of his location at all times pending the adopting proceedings. Yet no effort was made by the adopting parents, their attorney or the trial court to locate the biological father in this case. Upon discovering the adoption, Otakar promptly moved within the statutory 30-day period to challenge the adoption and assert his rights as the biological father of the child.

Although Illinois courts have considered the best interests of the child in cases such as this, courts have

deferred in the first instance to the relationship between parent and child in both custody and guardianship proceedings. (*In re Custody of Townsend* (1981), 86 Ill.2d 502, 56 Ill.Dec. 685, 427 N.E.2d 1231; *People ex rel. Edwards v. Livingston* (1969), 42 Ill.2d 201, 247 N.E.2d 417.) In *Townsend*, the supreme court required that a third-party seeking to obtain custody of a child to demonstrate "good cause or reason to overcome the presumption that a parent has a superior right to custody and further to show that it is in the child's best interests that the third-party be awarded the care, custody and control of the minor." (*Townsend*, 86 Ill.2d at 510-11, 56 Ill.Dec. at 689-90, 427 N.E.2d at 1235-36.) The phrase to "demonstrate good cause or reason to overcome the presumption that a parent has a superior right to custody" is legally equivalent to requiring a demonstration that a parent is not "fit." *In re Estate of Brown* (1990), 207 Ill.App.3d 139, 152 Ill.Dec. 70, 565 N.E.2d 312.

While it is true, as the majority argues, that the "superior rights doctrine" is an archaic rule of law emanating from a societal view of children as chattel, this doctrine has not been completely obliterated by the "best interests standard" promulgated by the majority. Instead, the presumption favoring biological parents is to be considered in light of *all relevant factors* in determining what is in the best interests of the child. In other words, a natural parent may be required to yield custody rights only where the best interests of the child would be served. (*Townsend*, 86 Ill.2d at 508-09, 56 Ill.Dec. at 688-89, 427 N.E.2d at 1234-35; *Livingston*, 42 Ill.2d at 208-210, 247 N.E.2d at 421-22; see also *In re Estate of Becton* (1985), 130 Ill. App.3d 763, 86 Ill.Dec. 121, 474 N.E.2d 1318.) In

Becton, the court held that the third-party must establish good cause or reason to overcome the presumption in favor of the natural parents. Among the factors courts should consider are: the sufficiency of the parent's home, its surroundings, the attachment of the child to a third-party and the happiness, security and comfort of the child. *In re Custody of Henkins* (1983), 117 Ill.App.3d 666, 72 Ill.Dec. 773, 453 N.E.2d 78.

The majority cites *In re Ashley K.* (1991), 212 Ill.App.3d 849, 879, 156 Ill.Dec. 925, 571 N.E.2d 905, in support of its "best interests analysis" wherein Justice Rizzi wrote for the majority:

> "A child's best interest is not part of an equation. It is not to be balanced against any other interest. In custody cases, a child's best interest is and must remain inviolate and impregnable from all other factors, including the interests of the biological parents." (*Ashley K.*, 212 Ill.App.3d at 879, 156 Ill.Dec. at 943, 571 N.E.2d at 923.)

It is interesting to note that in the earlier case of *Montgomery v. Roudez* (1987), 156 Ill.App.3d 262, 108 Ill.Dec. 803, 509 N.E.2d 499, Justice Rizzi wrote:

> "*A finding of unfitness cannot be based solely on a lack of continuous contact between a parent and her child.* Moreover, we have examined the interaction between plaintiff and [her child] and find nothing in the record to support a finding of parental unfitness on plaintiff's part. Clearly, a parent is not unfit in the usual sense of the word because she has faults or would be found lacking as an ideal parent.

* * * * * *

> Fitness of a parent is only one of the factors to be considered in determining how the best interests of a child will be served. * * * Plaintiff also argues that her superior right to custody of [her child] was not overcome by any good cause or reason sufficient to require an award of custody [to a third-party non-parent.]" *Montgomery*, 156 Ill.App.3d at 266, 108 Ill.Dec. at 806, 509 N.E.2d at 502. (Emphasis added.)

Justice Rizzi further explained that there are "many factors" to be considered in determining which custodial arrangement will best serve the interests of the child, including: (1) the wishes of the child; (2) the sufficiency and stability of the respective homes and surroundings of the parties; (3) the interaction and relationship between the parent and child; (4) the child's adjustment to his home; and (5) the mental and physical health of the parties involved. *Montgomery*, 156 Ill.App.3d at 267, 108 Ill.Dec. at 807, 509 N.E.2d at 503.

I initially note that the case of *Ashley K.* relied upon by the majority, interestingly enough involved a set of natural parents, both of whom were proven drug addicts, the biological mother was a known prostitute and Ashley was removed from their care due to proven neglect. Thus, *Ashley K.* is clearly distinguishable on its facts from the case *sub judice*. Secondly, in the instant case, there was no evidence presented to the trial court on the adoptive parents, in order to provide for a proper "best interests" analysis. The only evidence in the record indicating the "fitness" of the Does is that they defrauded the court by knowingly acceding to an adoption where they knew the

natural father had been deprived of any rights. It is interesting to note that in the majority opinion Justice Rizzi has failed to apply the multi-factor balancing test indigenous to a best interests analysis. To do so would be to admit that a best interests analysis was never performed by the trial court in this case. Moreover, in their appellate briefs and during oral argument before this court, no evidence was presented by counsel for either party regarding the best interests of Baby Richard.

The entire finding of unfitness in this instance rests upon the trial judge's finding that Otakar should have contacted a lawyer within 30 days of the due date instead of trying to make contact with the birth mother and searching through her garbage for evidence that the child was in fact alive. As Justice Rizzi stated in *Montgomery* (156 Ill.App.3d 262, 108 Ill.Dec. 803, 509 N.E.2d 499): *"A finding of unfitness cannot be based solely on a lack of continuous contact between a parent and her child."* (Emphasis added.) Nevertheless, the entire majority decision rests upon the fact that the biological parents have had no contact with Baby Richard since his birth. This must be the case since no evidentiary hearing was held on the many factors which may affect the best interests of Richard. Nothing in the record reflects the current care and security of Richard, the background of the Does or even the long-term and latent psychological effects on Baby Richard when he realizes the course of events which led to the termination of his natural father's parental rights.

In addition to state created rights, there are certain Constitutional safeguards relating to the family. The Supreme Court first extended Constitutional protection to the parent-child relationship in 1923 when it explained

that although no exact definition of the liberty guaranteed by the fourteenth amendment existed, "without doubt * * * it denotes the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home *and bring up children.*" (*Meyer v. Nebraska* (1923), 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042.) In 1944, the Court recognized that society has an interest in protecting the welfare of all children: "it is the interest of youth itself and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." (*Prince v. Massachusetts* (1944), 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645.) Finally, in 1974, the Supreme Court held: "this Court had long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." (*Cleveland Bd. of Ed. v. LaFleur* (1974), 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52.) Although the Court has never addressed third-party custody disputes directly, *Carey v. Population Serv. Int'l* (1977), 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675, extended the right of privacy to include the use of contraception to all persons, married or unmarried, since individuals have *a fundamental right in deciding to bear and beget a child.* The Court also accorded great deference to the parent-child relationship in *Parham v. J.R.* (1979), 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101.

Many other jurisdictions have rendered decisions purely on the basis of biological relations. (See, *Roche v. Roche* (1944), 25 Cal.2d 141, 152 P.2d 999 ("One of the natural rights incident to parenthood . . . is the right to

care and custody of a minor child."); *In re J.C.P.* (1983), 167 Ga.App. 572, 307 S.E.2d 1, (Only where compelling circumstances are found to exist by clear and convincing proof may a court sever the child-parent custodial relationship).) At least seven states clearly apply a parental rights standard to third-party custody disputes. *See In re D.A. McW.* (Fla.1984), 460 So.2d 368; *Blackburn v. Blackburn* (1982), 249 Ga. 689, 292 S.E.2d 821; *McGregor v. Phillips* (1975), 96 Idaho 779, 537 P.2d 59; *Sheppard v. Sheppard* (1981), 230 Kan. 146, 630 P.2d 1121; *Pierce v. Pierce* (1982), 198 Mont. 255, 645 P.2d 1353; *In re Grover* (Okla.1984), 681 P.2d 81; *Cyphers v. Cyphers* (1983), 172 W.Va. 280, 304 S.E.2d 866.

In the recent Michigan decision of *In re Clausen* (1993), 442 Mich. 648, 502 N.W.2d 649, which has become a *cause célèbre*, the biological mother incorrectly listed the wrong father's name during the adoption proceedings. While the adoption was pending the true biological father was discovered and proven through blood tests. The father then promptly moved to invalidate the adoption. Following a bench trial, the Iowa district court found that the father had established by a preponderance of the evidence that he was the biological father, that the adopting parents had failed to establish by clear and convincing evidence that he had abandoned the child or that his rights had been terminated and that a "best interests" analysis was not appropriate since abandonment was not established. The Michigan Supreme Court later affirmed the decision and the baby, Jessica, was returned to her biological parents. At the end of the proceedings, Jessica was two and one-half years of age.

Similarly, in the instant case, the father, Otakar, was unaware of the birth of his child until more than 30 days after his birth. It must be reiterated that the adopting parents and their attorney knew that the father could be located, but no attempt was made to do so. Moreover, Daniella told their lawyer of her plans to tell Otakar that the baby had died. While we should not totally discount the best interests of the child in this case, we cannot ignore the gross injustice perpetrated upon the biological father in this instance. This is not a case of a disinterested father or a man intending to leave his girlfriend "in the lurch." He lived with and cared for Daniella throughout her pregnancy, paying for all rent, food and medical necessities. He also made delivery arrangements for Baby Richard. It was only as a result of the meddling of Otakar's relatives that the relationship between the biological parents became severed. Daniella decisively and improvidently reacted to the hearsay information that Otakar was seeking his former girlfriend. It has been medically proven that women often react in an unusually emotional and volatile manner even to ordinary everyday occurrences during pre-natal and post-natal care, much less such a severe blow dealt to her in her eighth month of pregnancy. There is no evidence in the record that the information given to Daniella was even remotely true and it seems extremely doubtful given their subsequent reconciliation.

The interests of the child are but one factor to be considered in a case of such a delicate nature. We must consider the effect on the child who will one day learn that his biological father was defrauded and prevented of any opportunity to win his custody in a scheme which

involved the adopting parents and their attorney, not just the biological mother. Moreover, during the initial adoption hearing, the trial court did not require any proof of the biological father or his whereabouts. If there is no law requiring such an investigation, then the law must be changed. The potential damage of allowing the birth mother to solely control the termination of parental rights is immeasurable and the social costs too great. Even the biological mother herself is a sorry victim in this case. Her actions were entirely instigated by the interference of Otakar's relatives and a vicious unproven rumor which called into question her future relationship with Otakar and her prospective ability to care for the baby as a single mother and as a new immigrant in a foreign culture. This is not the case of a biological mother who had numerous bedfellows, hindering proper identification of the father, as was the case in *In re Clausen*.

The statutory language cited by the majority regarding a disposition hearing within 18 months of a custody transfer may prove adequate for certain foster care situations, but it is not really sufficient to remedy the tragedy of this case and the many others which may follow. The laws regarding parental termination based upon a finding of unfitness or abandonment within the first 30 days of birth were originally written to protect women at a time in our history when single mothers were deserted or abandoned after impregnation and out of a lack of economic resources and societal taboos were forced to sign away their parental rights to a "proper family." We are now living, for better or for worse, in the era of Murphy

Brown, where many women are choosing single motherhood and either deserting the natural father or abrogating any rights of the father by signing adoption consents or raising the child without ever informing the father of his legal status. This presents a potentially tragic situation for the unknowing natural father as well as any future adoptive parents, not to mention the child who is forever affected by the *imbroglio*, regardless of the outcome.

The majority consoles itself with the demise of the *Dred Scott* decision and the passing of an era when children were treated as chattel. Yet the fervent cries of all parties involved — "This is my child! Hew it in half it [sic] you must, but give me my share!" — strongly suggest that children are still being treated as chattel. Only the legal rhetoric has changed, as per the majority viewpoint in this case.

First and foremost, laws are needed mandating a good-faith investigation into the identity and location of the biological father prior to the finalization of any adoption. Severe sanctions should be imposed upon parties and their counsel for concealing information regarding the whereabouts of the natural father. Secondly, the time period within which the natural father may assert his rights must be limited to a fixed period of time, for example, no more than 30 days from the birth of the child, unless he possesses an affirmative defense, but in no case should this period be extended beyond 120 days. Finally, any assertion of parental rights within this time period should mandate an emergency hearing on the best interests of the child's disposition which would encompass the rights of the biological parent who had not

terminated his parental rights. Within 30 days of this hearing, an expedited appeal should be filed and scheduled for immediate hearing and an expedited ruling. The entire process should take no more than six months, unlike the instant case, where the process took two and one-half years. If this had been the law, we would now be deciding the fate of a six-month old infant and not that of a two and one-half year old toddler.[1]

The natural father in this case did what a reasonable man could be expected to do within the first 30 days of Baby Richard's life. Through the entire pre- and post-natal period, he held himself out as the father of Baby Richard, he never abandoned the baby and he even begged Daniella's uncle for information about the baby, culminating in his desperate search through garbage cans for discarded diapers or formula. One can visualize the pain and anguish this father was experiencing. One would not expect him to immediately run to an attorney at this pcint, when he had still hoped for an amicable reunion with Daniella. We have here two young people from a foreign country thrust into a situation where they were in love, but due to the interference of family and "well-meaning" social agencies, they end up losing legal right to their child. This case is not so different from the concepts promulgated by the Third Reich when it

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[1] When no one person has cared for an infant for more than a few months, the child should not yet have developed a dependency on any one person at the time of placement. Thus, placing the infant in a new setting should not have an adverse impact on him. See J. Bowlby, *Attachment and Loss* 222-23, 228 (1969); R. Patton, *Growth Failure in Maternal Deprivation* 38 (1963).

ruthlessly selected children at random and informed parents: "This child may live, but this other child must be forever removed because of religion or ethnic origin."

We are so overwrought by "pop culture" values in our society that we can allow, without hesitating, the concept now being promulgated, without a loud cry of "Something is wrong here." This child should be reunited with his biological parents. The mish-mash that society has somehow created in the year 1993 goes against core Judeo-Christian principles, which for thousands of years have supported the family unit above all else. Moreover, this concept is universal and transcends all national, ethnic and religious lines.[2] We are now elevating social workers, attorneys and media reaction above familial rights to determine the best interests of children.

Hypothetically, what happens if the adoptive family unit fails? What if the Does subsequently divorce? What if the adopting couple experiences emotional and physical crises? Will there come a time when Richard will discover his biological parents fought for his return for the first two and one-half years of his life?

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[2] "When the family is ruined, the timeless laws of family duty perish; and when duty is lost, chaos overwhelms the family

* * *

The sins of men who violate the family create disorder in society that undermines the constant laws of * * * family duty. * * * [W]e have heard that a place in hell is reserved for men who undermine family duties." (*Bhagavad – Gita* 10:40, 10:43, 10:44; Hindu scriptures, 1st century, A.D.)

If there is a voice in the wilderness crying out, it is the voice of law and reason. Our society has been founded on the concepts of family and freedom under the law for all. Without families and without biological parents, society must fail. There exists no stronger tie than the blending of two human beings, resulting in the creation of another human life. Obviously, there are thousands of unfit biological parents who ought not raise children. The tragic case of Baby Jessica in Michigan may be one such example. Where was the caring biological father in the *Clausen* case? In that instance, the court refused to apply a best interests analysis because it found that the biological father had never abandoned his child. As a result, two loving, adoptive parents have been destroyed. I am not suggesting that this should be the law in Illinois. I agree with the majority that the best interests of the baby must prevail, but only after a hearing of all evidence relevant to the child's future welfare. In this case, no such analysis was ever performed by the trial court. On appeal, the majority has created its own best interests analysis, and based upon the evidence presented in the record, the majority has reached an erroneous result.

Unlike the Baby Jessica case, this case involves two loving biological parents who remained together except for the brief period of time when Daniella became confused about her relationship. It was during this period that she signed her baby away. Otakar's rights were never protected. He never left her. He provided for her support throughout the pregnancy and even tried to send her money through an intermediary. He pled with her uncle to speak with Daniella and even searched through

garbage cans for evidence of the child. He did everything a reasonable person could have done except obtain the services of an attorney. However, within the first 30 days of Baby Richard's life, Otakar did not know the adoption process had commenced. The attorney for the Does could have easily ascertained the whereabouts of Otakar and yet he filed an adoption petition alleging that the biological father was "unknown." In so doing, the Does and their attorney filed a patently false document. A judgment for adoption cannot be entered on the basis of a false or fraudulent petition. Hence, this case warrants an outright reversal of the trial court's ruling, but at the very least, it should be remanded for a hearing and presentation of expert testimony in order to determine the best interests of Baby Richard.

The majority's concern with the separation of Baby Richard from his adoptive parents is understandable, but an abrupt termination of the Does's custody rights is not the only available remedy. Obviously, Baby Richard has formed "affection relations" or a "psychological relationship" with his adoptive parents. However, researchers have found that a child may enjoy more than one affection relationship.[3] A child applies what he or she has gained from the first affection relationship to later relationships with other individuals who give the child a similar amount of love, affection and attention. The affection relationship is not the sole province of the psychological parent. Other persons who offer emotional

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[3] See Note, *Adoption — Psychological v. Biological Parenthood in Determining the Best Interests of the Child*, 3 Seton Hall L.Rev. 130, 140 (1971).

support to the child can equally form an affection relationship with him. In addition, the order reversing an adoption, in a case such as this, could provide visitation rights to the adoptive parents for a limited period of time, in order to reduce the risk of psychological trauma caused by an abrupt severance and to help the child adjust to his new surroundings.[4]

There is no doubt that the rights of the biological parents were improperly obliterated by the lower court. The charade of terming the father "unfit" because he failed to immediately seek legal advice is preposterous and an insidious appendix to the already confused state of the law in such cases. If the biological father did not know when or where the child was born, when did the 30-day period for measuring fitness begin to run? If Otakar was informed the child had died, then the 30-day period could not have begun until May 12, almost two months after the baby's birth, when Daniella informed Otakar of the adoption. Until this point, there existed an impediment to Otakar exhibiting a reasonable degree of interest in Baby Richard. A proper application of the law would have recognized this impediment as an affirmative defense, based upon the unique facts of this case. Based

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[4] It is quite difficult and often ill-advised for the new family to deny the existence of the child's previous family. Post-judgment visitation by the adoptive parents could facilitate the child's development and integration into his "new" family. Of course, the court would have to consider all relevant factors in determining if post-judgment visitation would be in the best interests of the child and, if so, it would establish an appropriate visitation scheme. See Note, *Visitation After Adoption: In the Best Interests of the Child*, 59 N.Y.U.L.Rev. 633 (1984).

upon all of the foregoing, this adoption was improper, illegal and fraudulent and it should be vacated by this court.

Finally, if the majority wishes to solely based its opinion upon the "best interests" of the child then at the very least a "best interests" hearing should be held in order to consider all factors affecting the child's future welfare, including: (1) the wishes of the child; (2) the sufficiency and stability of the respective homes and surroundings of the parties; (3) the interaction and relationship between the parent and child; (4) the child's adjustment to his present home; (5) the mental and physical health of the parties involved. In addition, in this case, the "best interests" analysis must also weigh the apparent fraud of the adopting parents and their attorney; the volatile emotional state of the biological mother at the time of her initial consent to the adoption; and the apparent legitimate concern of the biological father, whose parental rights were terminated due to a finding of "unfitness." No evidence was presented to the trial court or to this court specifically concerning the best interests of Baby Richard. In any case, the best interests view adopted by this court must not be construed to lessen the vitality, integrity or stability of the biological family unit.

It is interesting that the majority, without blinking, has deemed itself all-knowing in this instance and has assumed a sacrosanct role formerly reserved for Divine Providence. The tradition of adoption in our society was created in order to provide a place of love and care for abandoned, unwanted and orphaned children. Baby Richard was never abandoned or unwanted. American society

should not be so devoid of humanity, fairness and just plain good common sense.

For all of the aforementioned reasons, I respectfully dissent from the majority view.

APPENDIX C

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – COUNTY DIVISION

IN THE MATTER OF THE PETITION OF JOHN DOE and JANE DOE TO ADOPT BABY BOY JANIKOVA, A MINOR.	)	NO. 91 CoA 364

ORDER

THIS CAUSE coming on to be heard for trial upon the Amended Petition to Adopt; the Court having heard evidence from the respective parties, argument by their counsel, and being fully advised in the premises, FINDS, that the petitioners have established by clear and convincing evidence that the biological father, OTAKAR KIRCHNER, is an unfit person as defined by the Illinois Adoption Act (Ch. 40, Par. 1501(D)(1)), in that he failed to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child during the first thirty (30) days after its birth;

IT IS, THEREFORE, HEREBY ORDERED that the parental rights of the biological father, OTAKAR KIRCHNER, to the minor, BABY BOY JANIKOVA, be, and the same are hereby terminated;

IT IS FURTHER ORDERED that the consent of the biological father, OTAKAR KIRCHNER, to the adoption of BABY BOY JANIKOVA is no longer required;

IT IS FURTHER ORDERED that there is no just reason to delay enforcement or appeal of this order.

ENTER: JUDGE EUGENE L. WACHOWSKI
MAY 08 1992
CIRCUIT COURT - 0078

APPENDIX D

No. 76063

IN THE
SUPREME COURT OF ILLINOIS

In re: The Petition of John Doe et al., etc. Otakar Kirchner, Appellant vs. John Doe et al., Appellees	)	Appeal from Appellate Court First District 1-92-1552 91 COA 364

ORDER

(Filed July 12, 1994)

The petitions for rehearing are *denied*.

Justice Heiple and Justice Freeman writing in support of the denial of rehearing. Justice McMorrow, joined by Justice Miller, dissenting.

Docket No. 76063 – Agenda 19 – March 1994.

In re THE PETITION OF JOHN DOE AND JANE DOE, Husband and Wife, to adopt Baby Boy Janikova (John Doe *et al.*, Appellees; Otakar Kirchner, Appellant).

JUSTICE HEIPLE, writing in support of the denial of rehearing:

On Thursday, June 16, 1994, this court reversed a decision by a divided appellate court which had affirmed certain adoption proceedings in the circuit court of Cook County. Our reversal was the result of the failure of the courts below to correctly apply Illinois law in terminating the natural father's parental rights. This cause is now before the court on petitions for rehearing filed by the adoptive parents and the guardian *ad litem* for the child. The following is offered in support of today's order denying rehearing.

I have been a judge for over 23 years. In that time, I have seldom before worked on a case that involved the spread of so much misinformation, nor one which dealt with as straightforward an application of law to fact.

As was made clear in the majority opinion, a conspiracy was undertaken to deny the natural father any knowledge of his son's existence. It began when the biological mother, 8½ months pregnant, was misinformed that the father, her fiance, had left her for another woman. She left their shared home and, at the encouragement of a social worker, agreed to give up her child. The social worker called her personal attorney, who contacted the adoptive mother (that attorney's friend and employee). At the behest of the adoptive parents and

their attorney, the mother gave birth at a different hospital than she and the father had planned to avoid the father's intervention; the mother surrendered the baby to strangers four days after his birth; and then falsely told the father that the child had died. All of this occurred in the space of less than three weeks.

The father did not believe the mother, and he immediately began an intensive and persistent search and inquiry to learn the truth and locate the child. On the 57th day following the child's birth, the father learned of his son's existence and of the pending adoption. On that day, he hired a lawyer and contested the adoption of his son by strangers. One may reasonably ask, What more could he have done? What more should he have done? The answer is that he did all that he could and should do.

The majority opinion pointed out that the adoptive parents should have relinquished the baby at that time. That is to say, on the 57th day. Instead of that, however, they were able to procure an entirely erroneous ruling from a trial judge that allowed the adoption to go forward. The father's only remedy at that stage was a legal appeal which he took. He is not the cause of the delay in this case. It was the adoptive parents' decision to prolong this litigation through a long and ultimately fruitless appeal. Now, the view has been expressed that the passage of time warrants their retention of the child; that it would not be fair to the child to return him to his natural parents, now married to each other, after the adoptive parents have delayed justice past the child's third birthday.

For a fuller and more detailed account of the father's efforts and the underlying facts, one may refer to the dissenting opinion authored by Justice Tully in the appellate court decision rendered below. (254 Ill. App. 3d 405, 418 (Tully, P.J., dissenting).) As noted by Justice Tully, Justice Rizzi, writing the majority opinion for himself and Justice Cerda, "patently distorted and slanted the facts on a number of important points." I would further add that Justice Rizzi grossly misstated the law.

If, as stated by Justice Rizzi, the best interests of the child is to be the determining factor in child custody cases (254 Ill. App. 3d at 412), persons seeking babies to adopt might profitably frequent grocery stores and snatch babies from carts when the parent is looking the other way. Then, if custody proceedings can be delayed long enough, they can assert that they have a nicer home, a superior education, a better job or whatever, and that the best interests of the child are with the baby snatchers. Children of parents living in public housing or other conditions deemed less than affluent and children with single parents might be considered particularly fair game. The law, thankfully, is otherwise.

In 1972, the United States Supreme Court, in the case of *Stanley v. Illinois* (1972), 405 U.S. 645, 31 L. Ed. 2d 537, 92 S. Ct. 1208, ruled that unmarried fathers cannot be treated differently than unmarried mothers or married parents when determining their rights to the custody of their children. (*Stanley*, 405 U.S. at 658, 31 L. Ed. 2d at 551, 92 S. Ct. at 1216.) The courts of Illinois are bound by that decision. Subsequently, in 1990, a unanimous Illinois Supreme Court pointed out that when ruling on parental

unfitness, a court is not to consider the child's best interests, since the child's welfare is not relevant in judging the fitness of the natural parent; that only after the parent is found by clear and convincing evidence to be unfit does the court proceed to consider the child's best interest and whether that interest would be served if the child were adopted by the petitioners. *In re Adoption of Syck* (1990), 138 Ill. 2d 255, 276-78.

Under Illinois law, a parent may be divested of his parental rights either voluntarily (*e.g.*, consenting to an adoption (see Ill. Rev. Stat. 1991, ch. 40, par. 1513)) or involuntarily (*e.g.*, finding of abuse, abandonment, neglect or lack of sufficient interest (see Ill. Rev. Stat. 1991, ch. 40 par. 1510)). As noted in the majority opinion, the adoption laws of Illinois are neither complex nor difficult of application. These laws intentionally place the burden of proof on the adoptive parents. In addition, Illinois law requires a good-faith effort to notify the natural father of the adoption proceedings. (Ill. Rev. Stat. 1991, ch. 40, par. 1509.) We call this due process of law. In the case at hand, both the adoptive parents and their attorney knew that a real father existed whose name was known to the mother but who refused to disclose it. Under these circumstances, the adoptive parents proceeded at their peril.

The best interest of the child standard is not to be denigrated. It is real. However, it is not triggered until it has been validly determined that the child is *available* for adoption. And, a child is not available for adoption until the rights his natural parents have been properly terminated. Any judge, lawyer, or guardian *ad litem* who has even the most cursory familiarity with adoption laws

knows that. Justice Rizzi, if he is to be taken at face value, does not know that.

Columnist Bob Greene apparently does not care. Rather columnist Greene has used this unfortunate controversy to stimulate readership and generate a series of syndicated newspapers columns in the Chicago Tribune and other papers that are both false and misleading. In so doing, he has wrongfully cried "fire" in a crowded theatre, and has needlessly alarmed other adoptive parents into ill-founded concerns that their own adoption proceedings may be in jeopardy. In support of his position, Greene has stirred up contempt against the Supreme Court as an institution, concluding one of his columns by referring to all of the Justices with the curse, "Damn them all." Chicago Tribune, June 19, 1994, Tempo Section, page 1.

Greene's implicit objective is to secure justice for a child. With that ethical and moral imperative, of course, no one could disagree. Greene, however, elevates himself above the facts, above the law, and above the Supreme Court of Illinois. He arrogates to himself the right to decide the case.

In support of his objective, Greene brings to bear the tools of the demagogue, namely, incomplete information, falsity, half truths, character assassination and spurious argumentation. He has conducted a steady assault on my abilities as a judge, headlining one of his columns "The Sloppiness of Justice Heiple." Another was entitled "Supreme Injustice for a Little Boy." He has shown my picture in his columns with bylines reading, respectively, "Justice Heiple: Ruling takes boy from home," and

"James D. Heiple: No justice for a child." References to, respectfully, Chicago Tribune, June 26, 1994, Tempo Section, page 1; June 19, 1994, Tempo Section, page 1; June 26, 1994, Tempo Section, page 1; June 19, 1994, Tempo Section, page 1.

Make no mistake about it. These are acts of journalistic terrorism. These columns are designed to discredit me as a judge and the Supreme Court as a dispenser of justice by stirring up disrespect and hatred among the general population.

Lest we forget the place from which he comes, let us remind ourselves that Greene is a journalist with a product to sell. He writes columns for a living. His income is dependent on writing and selling his columns to newspapers. He cannot secure either sales or earnings by writing on subjects that lack impact or drama. So, he must seek out subjects that are capable of generating wide public interest. An adoption case involving two sets of parents contesting for the custody of a three-year-old boy is a ready-made subject for this type of journalist. So far, so good.

The trouble with Greene's treatment of the subject, however, is that his columns have been biased, false and misleading. They have also been destructive to the cause of justice both in this case and in the wider perspective. Part of Greene's fury may be attributable to the fact that he staked out his views on this case in a published column that appeared on August 22, 1993. (Chicago Tribune, August 22, 1993, Tempo Section, page 1.) Subsequently, on June 16, 1994, the Supreme Court had the audacity to base its decision on the law rather than on his

newspaper column. So much for his self-professed moralizing.

That Greene has succeeded to a limited degree cannot be denied. I have, indeed, received several pieces of hate mail with such epithets as idiot, jerk, etc. The Governor, in a crass political move, announced his attempt to intervene in the case. And the General Assembly, without meaningful debate or consideration, rushed into law a constitutionally infirm statute with the goal of changing the Supreme Court's decision.

Both the Governor and the members of the General Assembly who supported this bill might be well advised to return to the classroom and take up Civics 101. The Governor, for his part, has no understanding of this case and no interest either public or private in its outcome. The legislature is not given the authority to decide private disputes between litigants. Neither does it sit as a super court to review unpopular decisions of the Supreme Court. We have three branches of government in this land. They are designated as the legislative, the executive and the judicial. Legislative adjudication of private disputes went by the wayside generations ago. Moreover, this case cannot be decided by public clamor generated by an irresponsible journalist. Neither can it be decided by its popularity or lack thereof. This case can only be decided by a court of law. That is a judicial function pure and simple. For the Supreme Court to surrender to this assault would be to surrender its independence, its integrity and its reason for being. In so doing, neither justice to the litigants nor the public interest would be served. Under the circumstances, this case looms even larger than the child or the two sets of contesting parents.

Many law suits are painful matters. This case is no exception. Capital cases, for instance, demand the forfeiture of the life of the defendant. Damage suits take money away from some people and give it to others. No one ever claimed that both sides walk away from a law suit with smiles on their faces. No member of this court ever entertained any thought that the decision it rendered in this case would be easy to accept by the losing litigants. Such an event would be incredible.

As for the child, age three, it is to be expected that there would be an initial shock, even a longing for a time in the absence of the persons whom he had viewed as parents. This trauma will be overcome, however, as it is every day across this land by children who suddenly find their parents separated by divorce or lost to them through death. It will not be an insurmountable trauma for a three-year-old child to be returned, at last, to his natural parents who want to raise him as their own. It will work itself out in the fullness of time. As for the adoptive parents, they will have to live with their pain and the knowledge that they wrongfully deprived a father of his child past the child's third birthday. They and their lawyer brought it on themselves.

This much is clear. Adoptive parents who comply with the law may feel secure in their adoptions. Natural parents may feel secure in their right to raise their own children. If there is a tragedy in this case, as has been suggested, then that tragedy is the wrongful breakup of a natural family and the keeping of a child by strangers without right. We must remember that the purpose of an adoption is to provide a home for a child, not a child for a home.

JUSTICE MCMORROW, dissenting from the denial of the petitions for rehearing:

I vote to allow the petitions for rehearing. I believe that the petitioners should be afforded another opportunity to present further argument on the specific legal and factual errors they believe this court has made in its decision. I am acutely sensitive to the future well being of the young boy in the instant case and the trauma which may be visited on him by this court's ruling. The lengthy period of time it has taken for his case to travel through the court system has exacerbated the complexity of the issues involved.

Issues that form the basis of my vote to allow the petitions for rehearing include: the extent of the court's duty to protect children when that protection may conflict with parental rights established by law; the propriety of the court's disregarding laws designed to prevent the taking of a child from biological parents where the evidence of parental unfitness may be insufficient but where the best interests of the child call for such separation; whether the broad policy statement in the Adoption Act concerning the best interests of the child should be interpreted as predominant over the articulated requirements of the Act; and whether which, if any, of the courts involved in this case misapprehended, unduly emphasized, or attached inappropriate credibility to certain evidence presented at trial. Further argument on these matters would be helpful.

I authored a concurring opinion in this case, joined in by two other justices, which analyzed the existing statutory, constitutional, and case law that applies to the case

at bar. Irrespective of the court's liking or agreement with that law, the court is duty-bound to follow that law. Under that law, parental unfitness must be proven *by clear and convincing evidence before* the court can proceed, in an adoption hearing, to a consideration of any other issue. Whether use of the parental rights doctrine, rather than the best interest of the child doctrine, as a standard in child adoption proceedings is realistic is a policy matter for legislative – rather than judicial – consideration.

If a child has lived in a particular home for a significant period of time, courts may desire to permit the child to remain in that home, notwithstanding any other factor. However, as indicated, the courts are required to follow the existing laws of this State regarding the termination of the biological parents' interests. The authority to amend existing statutory provisions that may be improvident is vested in the legislature, not the courts.

Notwithstanding these limitations, I believe that the petitioners should be permitted the opportunity, if they are able, to establish reasons why the judgment of the court was erroneous, under existing law. In my opinion, this court should grant the petitions for rehearing and carefully scrutinize the arguments presented, to eliminate the possibility that any material aspect of this appeal has been incorrectly decided. Therefore, I dissent from the denial of the petitions for rehearing.

JUSTICE MILLER joins in this dissent.

Docket No. 76063 – Agenda 19 – March 1994.

In re PETITION OF JOHN DOE AND JANE DOE, Husband and Wife, to adopt Baby Boy Janikova (John Doe *et al.*, Appellees; Otakar Kirchner, Appellant).

Justice Freeman specially concurring in the denial of the petition for rehearing:

I wholeheartedly concur in the court's decision to deny rehearing in this case.

In the weeks since the publication of this court's opinion in this case, there has been a tremendous public outcry. In light of the immediate consequences to all concerned, such was to be expected. We are, nonetheless, no less focused or certain of our mandate. We are constrained to interpret and apply the law as it is enacted by our legislature. This remains so, even in the midst of strong public opinion, media attention, and legislative action which comes now, only in the wake of what has been popularly deemed an unpopular decision. Our role is clear, and we possess no authority to deviate from our mandate. To now entreat, and further, require that we either rewrite or apply a law enacted based upon the testing of public opinion, results in an unworkable restructuring of the three branches of government.

To avoid what promises to be an emotionally difficult transition for this child, public sentiment would have us find that it is in his best interest to validate this adoption. For as much as this child has been received, loved and cared for by his adoptive parents, we may not rule oblivious to and in total disregard of the rights of his natural parents.

As petitioner correctly concedes, we are constrained to determine the issue of unfitness prior to engaging in any determination of the child's best interest. This we have done. We have reviewed the particularly unique set of facts in this case. And, based upon that review, we have determined that a conclusion opposite that which the trial and appellate courts reached is clearly evident.

Petitioner asserts that in that [sic] our review, we have inappropriately reweighed the evidence, and, in effect, substituted our judgment for that of the trial court. Our consideration of the evidence necessarily requires some sifting to determine its adequacy. Such a review, though not without limitation, is clearly within our province and requires more than a mere perfunctory examination.

In light of our findings, no purpose can be served by allowing rehearing in this case. The only thing to be gained by such unwarranted action is further, and still, further delay. Such delay can only serve to increase the difficulty already attendant the pending separation of this youngster from his adoptive parents. Equally as important a concern, however, is the avoidance of any unnecessary delay in the unification of this child and his natural parents and his assimilation process into his birth family.

For these reasons, I concur in the denial of the petition for rehearing.

Supreme Court, U.S.
FILED
OCT 11 1994
OFFICE OF THE CLERK

No. 94-615

In The

Supreme Court of the United States

October Term, 1994

In re Petition of
JOHN and JANE DOE, Husband and Wife,
to Adopt BABY BOY JANIKOVA,
a minor, by his guardian ad litem,
Edward J. O'Connell,

Petitioners,

v.

OTAKAR KIRCHNER,
Father of Baby Boy Janikova,

Respondent.

Petition For Writ Of Certiorari To The Illinois Supreme Court

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

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October 11, 1994

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This Petition for Certiorari is the second request for review of a decision of the Illinois Supreme Court, entered on June 16, 1994, reversing a finding of unfitness against Respondent Otakar Kirchner and vacating the trial court orders dependent on that finding, namely the orders terminating Mr. Kirchner's parental rights and allowing the adoption of his son ("Richard"). In answer to the first Petition for Certiorari (Case No. 94-236), which was filed on August 8, 1994, on behalf of Richard's guardian *ad litem,* Respondent has previously filed both a Brief in Opposition to Certiorari (dated September 8, 1994) and a Supplemental Brief in answer to a Brief *Amicus Curiae* filed on behalf of Jim Edgar, Governor of Illinois (dated September 28, 1994).

The instant petition, filed on behalf of Richard's current custodians, adds nothing of substance to the arguments already made to this Court in the original Petition and the *Amicus* Brief in support thereof; rather, it has served only to impede progress towards a final resolution of the legal dispute over the future of a young boy who is now more than three and one half years old.[1] Because Mr. Kirchner does not wish to contribute to the further delay engendered by this Petition, he hereby incorporates his Brief in Opposition and his Supplemental Brief filed in

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[1] The Illinois Supreme Court sought to encourage the expeditious review of this case by issuing an Order on July 13, 1994, staying enforcement of its mandate, with the stay to remain in effect until August 10, 1994, or until the final resolution of a request for review filed with this Court on or before August 9, 1994. *See* Appendix A.

Case number 94-236, as a full and complete response to the arguments in the Petition.

CONCLUSION

For the foregoing reasons, Respondent Otakar Kirchner respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

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Counsel of Record

BRUCE A. BOYER
ANNETTE R. APPELL
Children and Family Justice Center Northwestern University School of Law

LOREN L. HEINEMANN

APPENDIX A

No. 76063

IN THE SUPREME COURT OF ILLINOIS

IN THE MATTER OF THE PETITION OF JOHN DOE and JANE DOE, Husband and Wife,	)	Appeal from the Circuit Court of Cook County, County Department, County Division
Petitioner-Appellees,	)	No. 91 CoA 364,
TO ADOPT BABY BOY JANIKOVA, "RICHARD," A Minor,	)	Hon. Eugene L. Wachowski, Judge Presiding
Respondent-Appellee,	)	Appellate No. 1-92-1552
v.	)	
OTAKAR KIRCHNER,	)	
Respondent-Appellant.	)	

ORDER

(Filed Jul. 13, 1994)

THIS CAUSE coming to be heard on the minor-respondent-appellee's motion to stay the mandate of this Court in the above cause pending petition for writ of certiorari in the United States Supreme Court, this court being fully advised in the premises.

IT IS HEREBY ORDERED that the mandate of this Court in the above cause is stayed until August 10, 1994.

IT IS FURTHER ORDERED that if *certiorari* is applied for or notice of appeal filed on or before August 9, 1994,

the mandate of this court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal.

In the interest of expediting these proceedings, IT IS FURTHER ORDERED that no extensions of this stay shall be granted.

7-13-94
Date

/s/ James D. Heiple
JUSTICE

MOTION FILED
OCT 5 1994

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NOS. 94-236 AND 94-615

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

BABY "RICHARD", ALSO KNOWN AS BABY BOY JANIKOVA, A MINOR, BY HIS GUARDIAN *AD LITEM*, EDWARD J. O'CONNELL,
AND
JOHN AND JANE DOE, HUSBAND AND WIFE,
ADOPTIVE PARENTS OF BABY RICHARD,

PETITIONERS,

VS.

OTAKAR KIRCHNER,
BIOLOGICAL FATHER OF BABY RICHARD,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* DEBOER COMMITTEE FOR CHILDREN'S RIGHTS, LEGAL ACTION PROJECT OF THE NATIONAL COMMITTEE FOR THE RIGHTS OF THE CHILD, THE NATIONAL TASK FORCE FOR CHILDREN'S CONSTITUTIONAL RIGHTS, GEORGE H. RUSS IN SUPPORT OF PETITIONERS

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The DeBoer Committee for Children's Rights, Legal Action Project of the National Committee for the Rights of the

Child, the National Task Force for Children's Constitutional Rights, and George H. Russ move the Court for leave to file a brief of *amici curiae* in support of Petitioners and as a basis therefor show:

The DeBoer Committee for Children's Rights is a non-profit organization that was organized prior to the final decision in the case of Baby Jessica. In its relatively short history, the DeBoer Committee has organized 30 state chapters. Just this last weekend, the DeBoer Committee hosted its first national conference on children's rights. At least 35 "professionals" and 125 representatives from the state chapters met in Ann Arbor, Michigan to discuss its goals and objectives for the coming year. Although the DeBoer Committee has appeared as *amicus curiae* in numerous state cases involving children's rights, this is its first brief *amicus curiae* in this Court.

The National Committee for the Rights of the Child is a broad based coalition of over 40 national organizations and child advocacy centers working to improve the quality of life of children in the United States. The Legal Action Project of the

National Committee for the Rights of the Child was established in March, 1993. The Legal Action Project has been involved, often appearing as counsel of record or as *amicus curiae*, in cases involving children in Florida, Iowa, Michigan, Missouri, Kansas, Tennessee, South Carolina, California, New Jersey and Colorado.

The National Task Force for Children's Constitutional Rights was founded in 1988 by The Honorable Charles D. Gill, judge of the Connecticut Superior Court, and Dr. Anne Burgess of the University of Pennsylvania. The Task Force is a multidisciplinary organization with membership in all fifty states. The Task Force has appeared as *amicus curiae* in state and federal courts in cases involving the rights of children.

George H. Russ is an attorney in private practice in Florida. He practices in the area of family law and has been a member of various Florida commissions and committees concerned with the rights of children. He is an adoptive father; has represented Kimberly Mays (Twigg v. Mays, S.2d

1993); and has lectured nationally and internationally on issues of children's rights.

In sum, the organizations and professionals requesting permission to file a brief *amici curiae* have identified a long term commitment to protecting the rights of children and thus, it is submitted, have a sufficient interest in this matter.

Because of their expertise and experience in the area of children's law, the applicants can provide the Court with the broader implications of the Illinois Supreme Court's decision. Specifically, the applicants' brief analyzes the present case in the context of the expansion of children's statutory and constitutional rights across the nation.

The applicants present a broad perspective on the implications of the Illinois decision based on their experience in and knowledge of the area of children's rights. Given the federal and state constitutional implications of the present appeal, the Court may benefit from input from all knowledgeable sources. Moreover, the applicants also have had experience as *amici curiae* in other cases dealing with

children's rights.

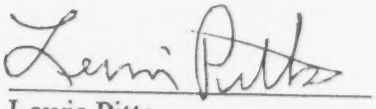
The applicants support the position of the Petitioners that the Illinois Supreme Court improperly ignored Baby Richard's protectible liberty interest in maintaining the relationship he has developed with his adoptive family as guaranteed to him by the Fourteenth Amendment to the United States Constitution.

The applicants have contacted all parties of record in order to obtain the consent of the parties to file a brief of . Permission, by telephone, has been granted by: Lee Ann Lowder, Of Counsel, for Petitioner Baby "Richard", also known as Baby Boy Janikova, a minor, by his guardian *ad litem*, Edward J. O'Connell; Richard Lipshitz, counsel for Petitioners John and Jane Doe, adoptive parents of Baby Richard; and, Thomas Geraghty, counsel for Respondent Otakar Kirchner.

WHEREFORE, the DeBoer Committee for Children's Rights, the Legal Action Project of the National Committee for the Rights of the Child, the National Task Force for Children's Constitutional Rights, and George H. Russ respectfully request

leave to file a brief of *amici curiae* in support of Petitioners.

Respectfully submitted,



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Nos. 94-236 and 94-

In The
Supreme Court of the United States
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BABY "RICHARD", also known as BABY BOY JANIKOVA, a minor, by his guardian *ad litem*, Edward J. O'Connell,
and
JOHN AND JANE DOE, Husband and Wife,
Adoptive Parents of Baby Richard,

Petitioners,.

vs.

OTAKAR KIRCHNER,
Biological father of Baby Richard,

Respondent.

On Writ Of Certiorari To The Illinois Supreme Court

BRIEF OF *AMICI CURIAE* DEBOER COMMITTEE FOR CHILDREN'S RIGHTS, LEGAL ACTION PROJECT OF THE NATIONAL COMMITTEE FOR THE RIGHTS OF THE CHILD, THE NATIONAL TASK FORCE FOR CHILDREN'S CONSTITUTIONAL RIGHTS, GEORGE H. RUSS IN SUPPORT OF PETITIONERS

QUESTIONS PRESENTED FOR REVIEW

1. Whether a three year old child, who has lived in a court-sanctioned adoptive home since he was four days old, has a liberty interest in maintaining his filial relationship with his adoptive parents, which cannot be abrogated without a hearing to determine whether it is in his best interests to be placed in the custody of his biological father, whom he has never met.

2. Whether this Court's decision in Stanley v. Illinois requires the Illinois courts to ignore the strong public policy codified in Illinois law, which favors the stability and permanence of adoptions at the consent of unmarried mothers.

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OPINIONS BELOW

The opinions below are attached as appendices to the Petitions of the adoptive parents and the child.

JURISDICTIONAL STATEMENT

Amici adopt the jurisdictional statement of the adoptive parents.

STATEMENT OF THE CASE

Amici adopt the statements of the case in the Petitions of the child and of the adoptive parents.

REASONS FOR GRANTING THE WRIT

This Court is not being asked to authorize governmental, agency, or private actions that would permit children to be snatched from intact families, regardless of the economic, social, or racial status of those families. Rather, the Court should allow a child to maintain and preserve established relationships with adoptive or de facto parents who have cared for and nurtured the child once the birth family has disintegrated to the extent that relationship

with the birth parent can be shown to be detrimental to the child's best interests.

I. THE ISSUES PRESENTED BY THIS CASE ARE OF CRITICAL IMPORTANCE TO ADOPTED AND ADOPTABLE CHILDREN AND THEIR BIOLOGICAL AND ADOPTIVE FAMILIES.

Thousands of adoptions occur every year, and many more children need adoptive placements.[1] Many other children are being raised by adults other than a genetic parent, without formal adoption. The expansive interpretation given to rights of putative fathers by the Illinois Supreme Court threatens the security of adoption as an alternative for children in need of families. Adult-centered interpretations of the law and biological bias endanger the meaningful familial relationships of children who have not been formally adopted and reduce the viability of adoption. In an era when many believe that there is an excess of procreation and a shortage of parenting, this is not only of personal significance to the individuals involved but of

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1 There are over 500,000 children in foster care, many of them remaining there for lack of adoptive placements.

broad legal and social significance because of the costs attendant upon denying children stable, reliable family relationships.

Cases such as this one will not go away. In addition to the Baby Jessica case [DeBoer v. DeBoer, 509 U.S. ___ (1993)] and this one, a similar unwed father adoption case was argued before the New Mexico Supreme Court this spring and is awaiting decision, and the Arizona Supreme Court decided two such cases this summer. These cases are reaching inconsistent results based at least in part on divergent understandings of this Court's decisions concerning the rights of unwed fathers. The Illinois Supreme Court focused on Stanley v. Illinois, 405 U.S. 645 (1972) and took a broad view of the rights of unwed fathers. The Arizona Supreme Court, focusing instead on Lehr v. Robertson, 463 U.S. 248 (1983) - which the Illinois Supreme Court ignored - reached an opposite result, and stressed the burden of unwed fathers to establish their entitlement to parental rights. Matter of Pima County Juvenile

Severance Action, 876 P.2d 1121, 1133 (Ariz. 1994) The Illinois Supreme Court decision is inconsistent with this Court's most recent rulings and the predominant understanding by the states of those rulings.

Conflicting interpretations and uncertainties about the impact of this Court's decisions about the rights of unwed fathers threaten the security of adoption as an alternative for children in need of families.

Most importantly, this Illinois Supreme Court decision unambiguously ignores the child's rights, needs and interests. It does so without consideration of, or even mention of, the holdings of this Court that a child is a 'person' protected by the Constitution. By totally leaving the child out of the equation, the decision propagates the traditional adult-centered perspective within family law which myopically analyses only the rightness or wrongness of conduct by the competing adults and has not incorporated the fundamental principle that a child is a person. The manifest

injustice to this child which will occur if he is snatched from the only family he has ever know, is ignored in an optical-illusion-like focus on highly disputed facts presented in highly charged ideological terms, such as evoking the spectre of the State breaking up natural families and taking children from poor and/or ethnic citizens. The optical illusion naturally appears then disappears absent a fully contextualized understanding. (In this case the Appeals Court affirmed the trial court; then the Supreme Court reversed; then two justices who voted to reverse joined in favor of rehearing.) The anchoring principle of including the child as a person in the constitutional analysis prevents the outcome from being determined by which ideological eye is cast upon the matter.

Amici submit that there is a compelling national interest in grant of certiorari so that this Court can consider, in a fully contextualized way, the extent and consequences of the treatment of children as property and not persons in this and similar cases.

II. BABY RICHARD HAS A FUNDAMENTAL LIBERTY INTEREST IN MAINTAINING THE RELATIONSHIP HE HAS DEVELOPED WITH HIS ADOPTIVE FAMILY, THE ONLY FAMILY HE HAS LIVED WITH FOR THE ENTIRE THREE AND A HALF YEARS OF HIS LIFE, WHICH THE ILLINOIS SUPREME COURT IMPROPERLY IGNORED

More that 25 years ago this Court stated: "Whatever may be their precise impact, neither the 14th Amendment nor the Bill of Rights is for adults alone." In re Gault, 387 US 1, 13 (1967). The Court held that children "are 'persons' under our Constitution" and are "possessed of fundamental rights which the State must respect." Tinker v. Des Moines School District, 393 US 503, 511 (1969).2

The Court has not determined the implications of this fundamental principle as it bears on the protection due children's

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2 As other of this Court's decisions hold, the fact that a person may not be able to act or choose autonomously is not dispositive, and "competence" in the usual adult sense is not a prerequisite to possession of constitutional rights. City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); see also Cruzan v. Director, Missouri Dept. of Health, 497 US ____, 111 L.Ed.2d 224 (1990).

relationships with their functional families.[3] This case squarely presents that issue. Amici believe that because a child is a 'person', it is relevant, in deciding who Richard's parents are, that he has lived with his adoptive parents for all but the first four days of his life, and how loss of that family could affect him.

A. Children have a liberty interest in continuity of relationships

As a "person" this child is protected by the Fourteenth Amendment to the United States Constitution. Among the fundamental elements of personal liberty protected by the 14th Amendment is the freedom of intimate association. Roberts v. United States Jaycees, 468 U.S. 609, 618-620 (1984) (Bill of Rights, in order to secure

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3 An experienced Connecticut state court judge recently wrote,

> It is ironic that although corporations in the United States have long been held to be "persons," and thus are eligible for constitutional protection, the extent to which children, as individuals, have comparable constitutional rights is still not entirely clear.

Gill, Essay on the Status of the American Child, 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen?, 17 Ohio Northern L.Rev. 543, 548 (1991).

individual liberty, shelters highly personal relationships from unwarranted state interference). This includes protection of family relationships, of which the Court said: "Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life." Roberts, 468 U.S. at 618-620. Roberts does not present biological connection that is the key to constitutional protection of intimate relationships.

The 14th Amendment protects a child's as well as an adult's family relationships, and the companionship and care which the family provides for a child:

> We now hold that this constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we

accord to the parent-child relationship. . . .

> When a child claims constitutional protection for her relationship with a parent, there is no custodial interest implicated, but only a companionship interest. This distinction between the parent-child and the child-parent relationship does not, however, justify constitutional protection for one but not the other. We hold that a child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest.

Smith v. City of Fontana, 818 F.2d 1411, 1418-1419 (9th Cir. 1987)(emphasis in original). The "companionship" interest described in Smith v. City of Fontana is clearly defined by the content of the relationship, not its genetic origin. It stems from nurture, not participation in the physical process of procreation.

If anything, family relationship is even more critical to a child than to an adult because of the vulnerability and dependency of a child. Parent figures are not fungible for children; adults are not interchangeable in the role of parent. Contrary to the Illinois Supreme Court's "bounce back" theory, stability

of parental relationships is critical to children's well-being.4

In Smith v. OFFER, 431 U.S. 816 (1977), the Court refused to limit its conception of 'family' to biological relationsips. The Court declined to decide the constitutional status of foster parents but acknowledged that although the usual understanding of "family" implies biological realtionsips, such "biologial relationships are not exclusive [determinants] of the existence of a family," noting that the legal protection of the husband-wife relationship is not based on shared blood.

The question of whether children have a constitutionally protected liberty interest in

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4 The fundamental developmental significance to a child of a long-term nurturing relationship with an adult is expressed metaphorically in the children's book, The Velveteen Rabbit:

> "What is REAL?" asked the Rabbit one day, when they were lying side by side near the room. "Does it mean having things that buzz inside you and a stick-out handle?"
>
> "Real isn't how you are made," said the Skin Horse. "It's a thing that happens to you. When someone loves you for a long, long time, not just to play with, but REALLY loves you, Then you become Real."

attachments to functional family members to whom they are not related by blood was left open in Smith v. Organization of Foster Families, 431 U.S. 816, 847 (1977) ("[foster children's] claim to a constitutionally protected liberty interest raises complex and novel question [but] it is unnecessary for us to resolve those questions definitely in this case"). However, the Court pointedly noted:

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, Wisconsin v. Yoder, 406 U.S. 205, 231-233 (1972), as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural the foster family should have the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.

Smith v. OFFER, 431 US at 844 (emphasis added).

A child is a person. When a functional family has the same place in the emotional life of the foster child and fulfills the same socializing functions as a "natural" family, then the child's relationship with that family should have the same protection as it would with a "natural" family.

An adoptive child's interests are far stronger than those of the foster children in Smith. The relationship between the adoptive parents and adoptive child is based on love, not contract and profit, and is intended by all concerned, including the state, to create a permanent parent-child bond. Thus it is even more like the relationships to which this Court has extended the greatest protection.

Where children have been placed with persons other than their biological parents for long periods of time, crucial bonds ususally form between them that cannot be distrubed without the same harm that comes from taking children from loving biological families. Goldstein, et.

al., BEFORE THE BEST INTERESTS OF THE CHILD (1979).

Adoption is the legal process by which a non-biological parent-child relationship is created; parenting is the social process. The legal process can be reversed, but the social process cannot. For Baby Richard, the process began the day he was placed with the Does. Children do not wait for a court to tell them who their parents are. To a child, whose ability to survive and grow physically and emotionally depends on having needs met by adults, it is adult conduct and not adult credentials that count. Legal principles that link protection of children's relationships to formalities and credentials in effect require a child to check birth certificates, marriage licenses and HLA test results before risking forming attachments or risk the consequences of later being determined to have bonded with the 'wrong" parents!

Respecting a child as a person requires respecting the child's relationships with those

who reliably meet that need. It requires protecting their relationships with people who have served as parents for them, for purposes of determining custody if not for purposes of determining parental rights.

At least one federal court has recognized that, after one year in foster care, the emotional ties between the foster parent and the foster child may have matured to such a degree that they are deserving of legal and constitutional protection. Brown v. County of San Joaquin, 601 F.Supp. 653, 662 (1985)(foster family relationship was similar to other familial relationships held by the Supreme Court to be entitled to constitutional protection, where the foster parent-foster child relationship had the same content as a healthy biological parent-child relationship). The court said, "Reality controls; the emotional sustenance and enrichment, the very sense of self, derived from an intimate relationship with one's parent or one's child cannot be discounted by the niceties of the relationship's

creation."5 See also In Re Jasmon O., Cal. Supreme Court No. S030556 (opinion filed 9/2/94) (children with long-standing relationships with non-biologically related adults develop certain constitutional rights which are protectable).

The Florida Supreme Court recently held that the nature of the relationship between a child and foster parents created a fundamental due process liberty interest in the foster parents such that they were entitled to notice and a meaningful opportunity to be heard in adoption proceedings initiated by the child's maternal grandparents. In re: Adoption of a Minor Child, 593 So.2d 185 (Fla. 1991). The court effectively adopted the concept that the closer a relationship between a child and an adult

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5 The court went on to say, "No one can instruct the infant foster child that his foster parent is not his real or natural parent; no one can diminish the infant foster child's feelings toward his foster parent and cause them to be distinguished from the feelings of an infant child to his natural parents." The court found that the State had created an expectation of an enduring relationship by leaving the child in foster care longer than statutorily permitted, and therefore allowed a fundamental liberty interest to come into existence by allowing a de facto parent/child relationship to develop.

becomes to that of a normal child/parent relationship, the greater the constitutional protection that should be provided to that relationship, regardless of the biology involved. 6

Interfering with the child's family relationship at the expense of his well-being would violates the child's rights and treats him and his rights as constitutionally less signficant than the birth father and his rights. The child is reduced, thereby, to an instrument to serve the birth father's interests. If the courts below wrongly interfered in the father's right to raise his child, that is not properly rectified by now having the state interefere in the child's life by depriving the child of his family and causing him emotional trauma, without a demonstration that this is in fact in his best

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6 See also Berhow v. Crow, 423 So.2d 371, 374 (Fla. App. 1982)("[A]s the nature of the foster parent/child's "familial relationship" becomes closer and stronger, so as to approach the level of the relationship between natural parents and their offspring, so too do the rights of the foster parents to preserve that relationship.")

interests. A hearing is necessary to determine the child's best interests at the time that the State attempts to disturb the child's world.

When faced with resolving a conflict between people who all have interests of constitutional magnitude, a court should "consider the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions." Davis v. Davis, 842 S.W.2d 588, 603 (Tenn. 1992). Instead, the Illinois Supreme Court's opinion treated only the biological father as having rights while the child was to being subject to being literally "repossessed" by a biological parents in the same manner as property, capable of ownership, without independent human rights.

In Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277 (1976), the New York Court of Appeals rejected the idea that a third party acquires "squatter's rights" in a child through long-term custody, but recognized that the child is a person and acquires rights in such a situation.

In Bennett a biological mother petitioned the court to obtain custody of her child from the child's custodian. The New York court upheld the presumption of parental custody but unanimously held that if "extraordinary circumstances" exist the lower court must examine into the child's best interests rather than simply applying a parental preference. Id., 356 N.E.2d at 280. The court held that one "extraordinary circumstance" triggering the requirement of considering the child's interest is when "the child [has been] so long in the custody of the nonparent that, even though there has been no abandonment or persisting neglect by the parent, the psychological trauma of removal is grave enough to threaten destruction of the child." Id., 356 N.E.2d at 284. The court noted that over time there had been a "shifting of emphasis" in the case law in this area. "This shifting reflects more the modern principle that a child is person, and not a subperson over which the parent has an absolute

possessory interest." Id., 356 N.E.2d at 281 (emphasis added).

Recently courts in several states, in cases of disputed paternity, have required the holding of a hearing to determine if blood testing is in a child's best interests when there is a presumed parent. These decisions reflect recognition that a necessary implication of treating a child as a "person" is respecting that child's functional family rather than privileging biology alone.

> Prior to ordering a blood test to determine whether the presumed parent is the biological parent, the district court must consider the best interest of the child, including physical, mental, and emotional needs. The shifting of paternity from the presumed father to the biological father could easily be detrimental to the emotional and physical well-being of the child. Although someone may suffer, it should never be the child, who is totally innocent and who has no control over or conception of the environment into which he or she has been placed.

Matter of Marriage of Ross, 783 P.2d 331, 338-339 (Kan. 1989) (emphasis added); Department of Health & Rehabilitative Serv. v. Privette, 617 So.2d 305 (Fla. 1993)("it seldom will be in the children's best interest to wrench them away

from their legal fathers and judicially declare that they now must regard strangers as their fathers. The law does not require such cruelty towards children.").7

Baby Richard has a real family; the Does are real parents because they parent him. He is entitled to protection of that relationship as much as adults are entitled to protection of their intimate relationships from State interference.

B. Children have a liberty interest in freedom from harm that may limit a fit parent's custody rights.

"Restoring" this child to his birth father would destroy the only family he knows. No matter how fine the birth father would be, substituting him for the "mommy" and "daddy" that the child knows and depends upon would come at a huge price to the child. The loss of family this child faces entails tremendous loss

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7 Cf. Michael H. v. Gerald D., 491 U.S. at 124 n.4 (plurality opinion) (liberty interest of a putative father cannot be evaluated in isolation, without reference to its effect on the other members of the family he seeks to intrude upon).

of trust and emotional security. This Court has recognized that harm to children's mental and emotional development involves injuries that cannot be reversed or remedied. Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas, 448 U.S. 1327, 1332 (1980) (irreparable harm to children of not being able to attend school; recognizing that developmental, emotional and behavioral damage to children cannot be repaired by a future legal remedy). The unique nature of the threatened harm to this child far outweighs the possible detriment to the adult parties, as recognized by the priority historically accorded to protecting vulnerable children. See, e.g., Prince v. Massachusetts, 321 U.S. 158 (1944); Hammer v. Dagenhart, 247 U.S. 251 (1918)(Holmes, J., dissenting).

The child has an interest in being protected from harm whether the harm comes from physical abuse or from severing his relationship with his long-term care givers. In Parham v. J.R., 442 U.S. 584 (1978), the Court noted that,

regardless of the state's respect for parental authority, and parent's right to decide what is best for the child, "we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." Id. at 604 (emphasis added).

Where legal recognition is withheld in situations involving established psychological and emotional relationships between children and adults they consider their parents, the forcible interruption of these relationships does not differ from those caused by separation from, or death of, natural or adoptive parents. Goldstein, et al, BEYOND THE BEST INTERESTS OF THE CHILD 27 (1973).

Due Process requires that Richard be given a hearing on whether removal from the Doe family is in his best interest and that he not be deprived of his safety and happiness but for the most compelling reasons. Interfering with the child's family relationship with the Does at the expense of his well-being would treat the child

and his rights as constitutionally less significant than the birth father and his rights, reducing the child to an instrument to serve the birth father's interests. The child is entitled to a hearing on his claim of irreparable harm.

A foreign court which comes from the same legal tradition in respect to family law as this country has ruled in the interests of protecting the child in a situation like this. In King v. Low, 1 R.C.S. 87, 105 (1985), Canada's highest court traced the development of English and Canadian law from child-as-chattel-of-genetic-parents to the view that "the Court in questions of contested custody, including contests between a natural parent an adoptive parents, must consider the welfare of the child the predominant factor and give it effect in reaching its determination." The Court approved the words of the trial court:

> [T]he child has by now established a strong bond instead with the adptive parents, who are as a result in relation to the child as if they were its natural parents. . . . It goes to the very roots of the child's experience of its world since

> that time. It would be extremely traumatic for the child now to be uprooted from its present home and to be returned to a stranger to it, even if that stranger is its natural mother. Though lawful, such an uprooting would do serious and perhaps permanent psychological damage to the child for it would be destructive of the truly close human bonds which it now has and would impair its prospects of functioning as a healthy human being as it grows older.

King v. Low, 1 R.C.S. at 104. The court said that where the parent-child bonds are with an adoptive rather than biological parent, "the court must perforce give recognition to the facts of the case accordingly. To do otherwise would be to substitute an empty formula for the substance which the law must embody and express." Id.

State court decisions construing biological fathers' rights recognize that a child's right to be protected from harm requires that the issue of custody be determined separately from the biological parent's rights if the child is placed at risk by disruption of a long-term adoptive placement, even where the adoption is overturned. See, In re Appeal of H.R., 581 A.2d 1141 (D.C. 1990); In re M.N.M., 605 A.2d 921

(D.C. 1992); Adoption of Kelsey S., 823 P.2d 1216, 1238 (Ca. 1992); Sorentino v. Family & Children's Society of Elizabeth, 378 A.2d 18, 19-20 (N.J. 1977).

In the "Baby M" surrogate parenting case the Supreme Court of New Jersey rejected the idea that the child should be made to suffer in order to correct wrongs done to adults.

> Our declaration that this surrogacy contract is unenforceable and illegal is sufficient to deter similar agreements. We need not sacrifice the child's interests in order to make that point sharper. . . . We disagree with the premise ... that in determining custody a court should decide what the child's best interest would be if some hypothetical state of facts had existed. Rather, we must look to what those best interests are, today, even if some of the facts may have resulted in part from legal error. The child's interests come first: we will not punish it for judicial errors, assuming any were made.

In the Matter of Baby M, 537 A.2d 1227, 1257-1258 (NJ 1988) (emphasis by the court).

Legal commentators have argued that remedies for violations of a parent's constitutional right to the custody of a biological child must be sensitive to the human dignity and constitutional rights of the children involved.

> Returning the boy to his natural father [after a wrongful adoption was vacated] follows the same logic as letting the defendant go free "because the constable has blundered." Whatever the soundness of such a policy for effectuating the prohibition against unreasonable searches and seizures, it is improper in the custody context because it imposes the cost of the state's errors on children who have no hand in creating either the particular situation or the laws governing it.
>
> Instead of awarding the child as the victor's prize, an appropriate alternative remedy would be to award money damages to the wronged parent. . . . money damages would provide a more powerful incentive for the state to change its procedures. By contrast, taking the child from the adoptive parents costs the state nothing.

Tremper, Respect for the Human Dignity of Minors: What the Constitution Requires, 39 Syracuse L.Rev. 1293, 1334-1335 (1988).

C. Bringing legal practice regarding children into line with principle.

It is now more than twenty-five years since this Court held that children are "persons" and have constitutional rights. That it was necessary to so hold evidences children's past status as less than "persons." The real issue in this case is whether and how to incorporate that "person" principle into practice.

Parental rights are unique among the rights protected by the 14th Amendment, because they involve the right to control another human being.8 Children need parents. However, if the State reinforces parental prerogatives when such prerogatives are demonstrably contrary to the child's well-being and ignores the child's rights, parent-child bonds become bonds of oppression. When the State privileges the biological parent's genetic contribution over the child's familial relationships with a functional, though non-biological, family, to the child's detriment, the parent's "liberty"

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8 Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925), still much cited in defense of parents' rights, are grounded in notions of children as property. Meyer and Pierce were "authored and joined by the Court's most inflexible laissez-faire conservative and grounded on economic substantive due process precedents." Woodhouse, "Who Owns the Child?" Meyer and Pierce and the Child as Property, 33 William & Mary Law Review 995, 1042 (1992). "[I]n Meyer the court vindicated the 'liberty' to control another human being . . ." Id. at 1099 n.577. As Governor Pierce of Oregon said during this Court's consideration of Pierce, "[I]t is a strange perversion of the word 'liberty' to apply it to a right to control the conduct of others." Quoted in Woodhouse, supra, at 1042.

becomes a lack of liberty for the child and the State treats the child as property.

This case is part of a necessary paradigm-shift in the law from children-as-chattel to children as rights-bearing people. The constitutional principles underlying this shift are well established. Courts, relying on tradition, have failed to apply them consistently to children. To the extent that case law reflects ideas of children-as-chattel instead of children-as-persons and has failed to consistently apply basic constitutional principles to children, the case law is due for a change.9/ Our legal concepts constantly

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9 It is not surprising that there is little case law addressing the child's rights in matters such as marriage dissolutions involving custody issues. These are treated as disputes between adults; children are usually not represented in these disputes, and "without counsel, rights not only fail to be vindicated, they fail to be created." Kleinfeld, The Balance of Power Among Infants, Their Parents, and the State, 4 Fam.L.Q. 320, 324 (1970). "The paucity of substantive law concerning the rights of minors in such matters as divorce, custody, juvenile delinquency, and mental health commitments may be attributable to the lack of independent representation in such proceedings." Genden, Separate Legal Representation for

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change to reflect the growth of society's values, and this change is proper. As the 11th Circuit pointed out in extending the protection of the fourteenth amendment to children in foster care:

> The fourteenth amendment, like the eighth amendment, "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 US 86, 101 (1958).

Taylor v. Ledbetter, 818 F.2d 791, 797 (11th Cir. 1987).

In breaking with common law tradition the Court will act consistently with well recognized fundamental constitutional and human rights principles and discard those portions of tradition which are inconsistent with the principles. Recognizing a child's right to protection of familial relationships recognizes the human dignity of minors.

This paradigm shift in the legal status of children is similar to other paradigm shifts in

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9(...continued)
Children: Protecting the Rights and Interests of Minors in Judicial Proceedings, 11 Harv.C.R.-C.L. Law Rev. 565 n.2 (1976).

this nation's history. It is at once a major change and yet at the same time simply a more consistent application of our professed principles.

At this Nation's founding, the Founding Father proclaimed it as "self-evident" that "all men are created equal," and yet felt it obvious that African American men were "different," such that a black man had no rights which a white man was bound to respect (in the infamous words of the Dred Scott decision). It was also obvious that women, of any race, were "different" and therefore could be denied the rights guaranteed to "all persons" - such as the right to vote.10/

African Americans, women and children have in common the history of being treated essentially as property and as exceptions to the social contract upon which our founding

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10 Shortly after ratification of the 14th Amendment, which promised all citizens equal protection of the laws, the U.S. Supreme Court upheld an Illinois prohibition against women becoming lawyers. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

documents declared this nation to be based.11/ In each case, the articulation of the principle that members of each group were constitutional "persons" came well before society in general and the legal system actually treated them as such.

Just as for African Americans and women, steps toward progress for children have not come easily or without protest and resistance. For example, we now take for granted the child labor laws passed during the early twentieth century. At the time, however, some religious leaders and conservative political forces opposed such laws as unwarranted governmental interference in the

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11 One scholar notes that "from Roman times to the mid-nineteenth century [children] were treated as something akin to property and had rights which might be characterized as falling somewhere between those of slaves and those of animals." Cohen, Relationships Between the Child, the Family, and the State, in PERSPECTIVES ON THE FAMILY 293 (M. Bayles, R. Moffit & J. Greie, eds. 1990). American attitudes toward the treatment of children did not begin to change until the end of the nineteenth century. Hart, From Property to Person Status: Historical Perspective on Children's Rights, 46 Am.Psychologist 53 (Jan. 1991). Even then, the Society for the Prevention of Cruelty to Animals was founded before a similar society to protect children.

economy and the privacy rights of the family. See Hammer v. Dagenhart, 247 U.S. 251 (1918); Mnookin, CHILD, FAMILY AND STATE 646-68 (1978).

"Tradition" could not sanctify slavery or segregration or disenfranchisement of women or discriminatory treatment of children born out of wedlock. It cannot sanctify treatment of children as chattel subject to repossession by absentee owners claiming genetic title. The claims raised by this child cry out for a hearing.

III. STANLEY V. ILLINOIS DOES NOT REQUIRE THE ILLINOIS COURTS TO IGNORE THE STRONG PUBLIC POLICY CODIFIED IN ILLINOIS LAW, WHICH FAVORS THE STABILITY AND PERMANENCE OF ADOPTIONS AT THE CONSENT OF UNMARRIED MOTHERS

The Illinois Supreme Court's decision that the biological father's parental rights were terminated improperly begs the question of whether he had parental rights. The court relied on Stanley v. Illinois, 405 U.S. 645 (1972), and read it expansively. Stanley must be read in context with subsequent opinions of the U.S. Supreme Court regarding unwed fathers.

These cases look at family relationships in functional, not solely biological, terms and are more consistent with the fundamental principle that the children involved are constitutionally protected persons, too, and more consistent with contemporary understanding of the effect on children of judically switching fathers on them.

In Quilloin v. Walcott, 434 U.S. 246 (1978), this Court upheld a decision denying legitimation and permitting an adoption over the objections of the unwed biological father, even though he had maintained contact with the child and brought him gifts, on the ground that it was in the child's best interest:

> Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.'

Quilloin v. Walcott, 434 U.S. at 255. The child's interest in being adopted into his

already existing family unit prevailed over requirement for proof of the father's "unfitness", and the Court upheld a Georgia statute permitting adoption of an illegitimate child without the natural father's consent unless the father had obtained a paternity ordery.

The liberty interest entitiled to constitutional protection is "the relationship of love and duty in a recognized family unit." Lehr v. Robertson, 463 U.S. 248, 257 (1983). In Lehr the Court rejected an unwed father's claim that he had an absolute right to notice and a hearing before his child could be adopted. The court found that the state did not violate the father's rights to due process and equal protection by failing to give notice of the adoption proceedings, even though the state had actual knowledge of his existence and whereabouts. The Court reasoned that the putative father could have guaranteed that he would receive notice of any adoption proceedings by mailing a postcard to New York's putative

father registry. He did not avail himself of that opportunity, nor did he seek to establish his paternity until after the mother remarried and her new husband had adopted the child. The Court saw a "clear distinction between a mere biological relationship and an actual relationship of parental responsibility," and said that '[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." Lehr, 463 US at 260-261. In Lehr the Court emphasized that "the rights of the parents are a counterpart of the responsibilities they have assumed." Id., 463 U.S. 257.12

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12 Professor Homer H. Clark, Jr., author of the much-cited treatise LAW OF DOMESTIC RELATIONS (2d ed. 1987), has contrast the adult-centered (father-centered) Stanley with the more child-friendly Lehr:

> The most striking aspect of Stanley is the Supreme Court's silence on the interests of the children as well as the effect of the decision on adoptions, and thus on children's welfare generally. . . . The opinion concentrated exclusively on the rights of the father, treating the children more like inanimate objects than persons. . . . . Lehr at last recognized that the

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> When an unwed father demonstrates a full commitment to the responsibilities of parenthood . . . his interest in prersonal contact with his child acquires substantial protection under the Due Process Caluse . . . But the mere existence of a biological link does not merit equivalent constitutional protection. . . .

Lehr, 463 U.S. at 261. "If he fails to [grasp the opportunity], the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie." Lehr, 463 U.S. at 263.

One way a biological father who is frustrated by the birth mother can "grasp the opportunity" is to file a paternity suit. The Respondent said he did not file a paternity action because he did not know the law. The trial court properly held that ignorance of the law is no excuse. See Lehr, 463 U.S. at 265 (biological father's ignorance of putative father registry not dispositive). Such a

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12(...continued)
state's interest in establishing workable adoption procedures was based on the needs of children, especially out-of-wedlock chidlren, for secure adoption placements. Clark, Children and the Constitution, 1992 Univ. of Ill. Law Rev. 1, 20-22 (1992).

conclusion is consistent with recognizing the child's personhood and need for prompt resolution of family status, independent of the biological father's reasons for not acting.

The Respondent did not fall into any of the categories of men entitled to notice of a pending adoption in the statute upheld as Constitutional by this Court in Lehr - i.e., the State was not constitutionally required to ensure notice.

A biological father is not automatically constitutionally entitled to custody or visitation. In Michael H. v. Gerald D., 491 U.S. 110, 130 (1989), the Court upheld the right of California to bar an admitted biological father from proving his paternity of a child born during the mother's marriage to another man, even when he had established a relationship with the child. The Court said,

> [Appellant] reads the landmark case of Stanley v. Illinois, and the subsequent cases of Quilloin v. Walcott, Caban v. Mohammed, and Lehr v. Robertson, as establishing that a liberty interest is created by biological fatherhood plus an established parental relationship . . . . We think that distorts the rationale of

> those cases. As we view them, they rest not upon such isolated factors, but upon the historic respect -- sanctity would not be too strong a term -- traditionally accorded to the relationships that develop within the unitary family.

Michael H., 491 U.S. at 123 (plurality opinion)(citations omitted).

Thus, an unwed father of a newborn does not start off in the same constitutional position as either a man married to the child's mother or an an unwed father who has actually parented his child(ren) as had the unwed father in Stanley v. Illinois. He has to affirmatively establish his status, and determination of his status does not occur in a vacuum without consideration of other people's rights.

Because children need functional parents, and parental rights, quite reasonably, are difficult to terminate once they exist, it is also reasonable, for the child's sake and society sake, to set hurdles that must be cleared to establish parental status and entitlement to parental rights. The legislature could decide that unwed fathers should unequivocally establish their commitment to

assume responsibility for the child. If they do not, the child should have an opportunity with another family.

An unwed father who does not unequivocally demonstrate a commitment should not be able to maintain a form of absentee ownership of a child based on genetic title that gives him a veto power over adoption and forecloses other custody options for the child, thus depriving the child of the opportunity for a real family. Recent state court decisions construing Lehr reject an adult-centered focus on a biological father's reason for delay and instead focus on the child's need for prompt certainty.

"[T]he timing of the father's action is the 'most significant' element in determining whether an unwed father has created a liberty interest [citation omitted]." Robert O. v. Russell K., 80 N.Y.2d at 264, 604 N.E.2d at 103.

> To conclude that petitioner acted promptly once he became aware of the child is to fundamentally misconstrue whose timetable is relevent. Promptness is measure in terms of the baby's life not by the onset of the father's awareness. The demand for prompt action by the father at the child's birth is neither arbitrary nor

> punitive, but instead a logical and necessary outgrowth of the State's legitimate interest in the child's need for early permanence and stability.

Id., 604 N.E.2d at 103-104.

> The ultimate question must be whether the father has, in fact, created a relationship. Even if this father had taken all possible steps to bond with his child and failed, Lehr's message is that to protect his interest, and the child's well-being, he must do more. For in the child's eyes, a valiant but failed attempt to create a relationship means little. Severing long-established bonds with others is equally harmful to the child, regardless of whether the father first attempted to create a relationship. Therefore, if the father's parenting attempts are unsuccessful, he must rapidly turn to legal recourse so that the child may obtain a final placment as quickly as possible. In this area, as in few others, there must be prompt recourse to the law.

Matter of Pima County Juvenile Severance Action, 876 P.2d 1121, 1133 (Ariz. 1994). The court stressed "prompt finality" as the paremount goal "as a matter of matter of sound jurisprudence," because "[o]therwise a young child languishes in limbo - surrendered by the mother, unclaimed by the father, and bonding with others - from which the law cannot extricate the child without lengthy proceedings compounding the harm." Id., 876 P.2d at 1132.

When Mr. Kirchner's answer in the adoption proceeding was stricken because he had not established paternity, he did not file a paternity action for more than three months - although he was fully on notice that his claim to parental status was not recognized and that any potential parental rights were in danger, he was represented by counsel, and he knew the child was bonding with the adoptive parents. Whether or not that delay, in the face of full notice of the stakes, establishes unfitness under subsection 1(D)(n) of the Adoption Act, it certainly supports the lower courts' determinations that his inaction in the first 30 days after the child's birth demonstrates lack of concern rather than confusion caused by the birth mother.13 It is not the kind of prompt,

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13 Likewise, the Court of Appeals points out that Mr. Kirchner's counsel (like the Does' counsel) did nothing to urge the courts to speed hearing and review of the adoption proceeding. Such efforts might not have succeeded, of course; but, the point is that they weren't made. There did not seem to be a sense of urgency commensurate to what was at stake and to what the birth father said his feelings were.

definitive action required by Lehr and a growing number of state courts.

CONCLUSION

Due respect for the personhood and human dignity of children - the characteristics that distinguish them from property which can be shunted about depending on claims of ownership - requires that we respect the functional family relationships of children. Children have only one childhood in which to accomplish all the tasks and meet all the challenges involved in growing up. They do not go into suspended animation while adults debate whether to fulfill their duties toward children or whether a child is bonding with the "wrong" family.

The decision of the Illinois Supreme Court only balanced, weighed, and judged the interests of contending adults and never once acknowledged the child as having any interest worthy of consideration. It treated the child as the property of his biological parents. It demonstrates and reinforces precisely the "Dred Scott mentality" which the Court of Appeals

optimistically believed to have been eliminated from the law. The U.S. Constitution, with its emphasis on the human dignity of all people, requires more.

The Illinois court's fear that consideration of the best interests of the child would mean that the decision based on wealth or other unacceptable criteria applied to contending adults to identify the "better parent" is wholly misplaced. The routine standard for determining custody between biological parents and third parties is the presumption that the birth parents are fit, able and appropriate to raise their child. To acknowledge the human dignity of the child requires, however, that in two extraordinary circumstances the presumption in favor of birth parent custody give way to use of the best interests of the child standard for determining custody:

a. Unfitness of the biological parents.

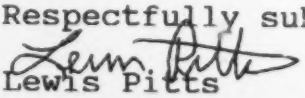
b. Long-term placement of the child with non-biological caretakers, with whom the child has formed a parent-child bond, such that removal of the child threatens grave harm to the child.

Baby Richard's case fits under both principles. Baby Richard, independent of any rights of the adoptive parents, is entitled to a hearing at which his best interest is the touchstone for making the custody determination. Otherwise, Baby Richard is merely a piece of property.

According, amici respectfully request that this Court grant the petitions of the adoptive parents and the child for a writ of certiorari.

Dated: October 4, 1994

Respectfully submitted,



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